

APPENDIX

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F. J.

JUN 29 1971

E. ROBERT SEAMER, CLERK

70-88

IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

No. ~~1898~~

S&E CONTRACTORS, INC., *Petitioner,*

v.

UNITED STATES, *Respondent.*

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF CLAIMS

PETITION FOR HABEAS CORPUS FILED FEBRUARY 24, 1971
HABEAS CORPUS GRANTED MAY 17, 1971

IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1398

S&E CONTRACTORS, INC., *Petitioner,*

v.

UNITED STATES, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CLAIMS

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APPENDIX

Events Preceding Suit in the Court of Claims

August 4, 1961—S&E awarded contract by AEC.

June 29, 1962—Contract completed and work accepted by Government.

August 8, 1962—Contracting Officer issues decision rejecting six of ten claims for equitable adjustments in contract price and time earlier submitted by S&E.

September 4, 1962—S&E files notice of appeal from Contracting Officer's decision in accordance with contract's disputes clause. Appeal docketed as CA-161.

October 22, 1962—Contracting Officer denies additional claims submitted by S&E; these claims, docketed as CA-162, are consolidated with pending appeal.

December 3, 1962—Adversary proceeding on S&E's disputes claims commenced before hearing examiner.

June 26, 1963—Decision of hearing examiner allowing eight of S&E's nine claims; claims remanded to Contracting Officer for settlement.

July 11, 1963—Contracting Officer files petition for a full Commission review of hearing examiner's decision.

November 14, 1963—AEC Commissioners grant, in part, Contracting Officer's petition for review and order prompt payment to be made to S&E on balance of claims being denied review.

February 11, 1964—Contracting Officer's petition for reconsideration of AEC's order of November 14, 1963 granting limited review denied.

March 27, 1964—AEC General Manager transmits to GAO a letter dated March 6, 1964 from an AEC certifying

officer requesting GAO decision whether a voucher, covering sums withheld from S&E by Contracting Officer, could be paid. The General Manager's transmittal letter stated that the forwarding of the certifying officer's request should not be taken as a request, by the AEC, for either GAO review of, or concurrence in, the decisions reached on S&E's disputes clause claims.

May 13, 1964—AEC Commissioners issue decision affirming and partially modifying the hearing examiner's decision and order Contracting Officer to proceed to final settlement of S&E's claims.

December 5, 1966—GAO issues Opinion B-153841 (46 Decs. Comp. Gen 441) responding to March 27, 1964 request of AEC certifying officer and holding that S&E has no valid claim on the basis of the July 26, 1963 decision of hearing examiner as modified by the Commission November 14, 1963 and May 13, 1964.

Docket Entries in the Court of Claims

April 14, 1967—Petition filed.

April 27, 1967—Court filed Order referring case to Commissioner Mastin G. White.

August 11, 1967—Defendant's answer to petition filed.

December 4, 1967—Plaintiff's motion for summary judgment in support of an administrative decision filed.

April 3, 1968—Defendant's opposition to Plaintiff's motion and Defendant's cross motion for summary judgment filed.

November 4, 1968—Plaintiff's reply to Defendant's opposition to Plaintiff's motion for summary judgment and response to Defendant's cross motion for summary judgment filed.

March 13, 1969—Defendant's reply brief filed.

September 26, 1969—Commissioner's report to the court on Plaintiff's motion and Defendant's cross motion for summary judgment filed.

November 21, 1969—Defendant's request for review of the Commissioner's recommended opinion filed.

March 19, 1970—Plaintiff's response to Defendant's request for review of the Commissioner's recommended opinion filed.

March 31, 1970—General Accounting Office's motion for leave to file a brief *amicus curiae* and to present oral argument should the court so desire filed. Allowed April 13, 1970 in that the General Accounting Office is authorized to file a brief *amicus curiae*.

May 1, 1970—Brief of the United States General Accounting Office as *amicus curiae* filed.

May 4, 1970—Defendant's reply to Plaintiff's response to Defendant's request for review of the Commissioner's recommended opinion filed.

June 4, 1970—Argued and submitted on Plaintiff's motion for summary judgment and Defendant's cross motion for summary judgment.

November 30, 1970—The case is remanded to the trial commissioner for his consideration and report on the various claims under Wunderlich Act standards. Opinion by Judge Nichols. Dissenting opinion by Judge Skelton in which Chief Judge Cowen joins. Dissenting opinion by Judge Collins.

April 6, 1971—Notice of filing in the Supreme Court of a petition for writ of certiorari on February 26, 1971, No. 1398, October Term, 1970.

May 24, 1971—Order of the Supreme Court dated May 17, 1971, granting petition for writ of certiorari, filed.

IN THE UNITED STATES COURT OF CLAIMS

No. 104-67

S&E CONTRACTORS, INC., a corporation, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

PETITION

(Filed 11 April 1967)

Comes now S&E CONTRACTORS, INC. (Petitioner) and respectfully represents to the Court the following:

1. Petitioner is a corporation organized and existing under the laws of the State of Texas.
2. Jurisdiction of these causes of action is conferred on this Court by 62 Stat. 940, Title 28 U.S.C. § 1491.
3. On or about August 4, 1961, the United States Government, acting by and through the United States Atomic Energy Commission (Commission) and Petitioner entered into a fixed price contract, No. AT(30-3)-790, for the construction of a testing facility consisting of a large concrete basin with accompanying structures, at the Naval Reactor Test Site, in the vicinity of Idaho Falls, Idaho, for the amount of One Million Two Hundred Seventy-Two Thousand Dollars (\$1,272,000.00). The original contract was to be completed 180 days from August 10, 1961, when the site was to have been available. This was later extended by 45 days by change orders not in issue here.
4. The contract was executed on U.S. Standard Form 23, 1953 Ed., with Standard General Provisions, Form 23A, which contained the standard "Changes" clause (G.P. 3); "Changed Conditions" clause (G.P. 4); the "Time Extensions, etc." clause (G.P. 5); and "Disputes" clause (G.P. 6); additional General Provisions containing a "Suspend-

sion of Work" clause (G.P. 32); as well as various amendments, addenda, change orders, specifications and drawings, all of which are incorporated herein by reference as fully and completely as though set out in detail.

5. Inasmuch as the entire site was not available as provided, because of the presence of another contractor, pursuant to a memorandum of understanding between the parties, dated August 2, 1961, the Contracting Officer agreed that on August 10, 1961, Petitioner would "be allowed to proceed with all work in the major portion of the westerly half of the building."

6. On August 10, 1961, Petitioner was given a partial notice to proceed with all the work in the major portion of the westerly half of the basin.

7. On September 10, 1961, Petitioner was notified that it had unrestricted and unlimited access to the entire site. The work was completed and accepted by Defendant on June 29, 1962, 325 days after the partial notice to proceed was given.

8. Numerous requests and ten claims were presented by Petitioner to the Contracting Officer for extensions of time and equitable adjustments on various bases, throughout the performance of the work. All claims and requests which are in issue herein are detailed hereinafter in Paragraph 15.

9. The Contracting Officer rendered a decision dated August 8, 1962, on these claims wherein he denied an extension of time based on the contention that Petitioner was not allowed full access to the site until September 10, 1962. He granted an adjustment of price and time under six change orders; denied extensions of time for the Government's failure to provide steam and for the removal of backfill; granted a four day time extension for delay due to unusually severe weather but denied additional time extensions for unusually severe weather; denied a claim for 158 days of extension submitted by Petitioner on the

basis that it was impossible to perform the contract in 180 days; and denied a comprehensive claim for increased costs in the amount of One Million Four Hundred Fifteen Thousand Four Hundred and Sixty-Seven Dollars and Five Cents (\$1,415,467.05).

10. Petitioner timely appealed this decision to the Commission.

11. On October 22, 1962, Petitioner submitted nine additional claims to the Contracting Officer in various amounts. There were the subject of the Contracting Officer's decision of November 8, 1962, wherein he denied a request for an immediate payment of amounts withheld of approximately One Hundred Twenty-Four Thousand Two Hundred Eighty-One Dollars (\$124,281.00) and in a second supplemental decision he granted certain minor adjustments and denied a claim for installing felting on the damper blades in the ventilating units. Timely appeal of these decisions was made to the Commission.

12. The two appeals referenced in allegations 10 and 11 were consolidated and were heard by a Hearing Examiner for the Atomic Energy Commission during December of 1962 and January 1963.

13. The Hearing Examiner rendered a decision on June 26, 1963, which sustained the appeal of Petitioner on eight of its claims and remanded them to the Contracting Officer for settlement.

14. The Contracting Officer appealed the findings of the Hearing Examiner to the full Commission which in a memorandum and order dated November 14, 1963, and a Decision dated May 13, 1964, modified the Decision on Claim No. (1) (Time for Commencement of Performance), reversed it on Claim No. (7) (Felting of Damper Blades) and affirmed it in all other respects, and remanded it to the Contracting Officer for settlement.

15. The following determinations were made with respect to various claims:

TIME FOR COMMENCEMENT OF PERFORMANCE

(1) The Examiner held that Petitioner had not been permitted to have access to the western half of the basin on August 10, 1961, and that full access was not available until September 10, 1961, and that the time for completion of the contract should be increased 31 days and that Petitioner was entitled to a price adjustment under the Suspension of Work clause. By its decision of May 13, 1964, the Commission modified the Examiner's decision on this claim by directing that an appropriate initial period should have been allowed by Petitioner for mobilization of men and materials and that the adjustment should be confined to the actual interference with Petitioner's access to the site, and the Commission ordered the parties to negotiate on that basis. The 31 day time extension was not disturbed.

CHANGE ORDER No. 2

(2) The Examiner held that Petitioner was entitled to at least a 60 day extension of time and price adjustment due to the extensive contract modifications required by Change Order No. 2, and incidentally that Petitioner was not bound by a contract amendment offered to it for signature by the Government based on earlier negotiations thereon but never signed.

NON-AVAILABILITY OF STEAM

(3) He also held that Petitioner was entitled to a 25 day time extension for delay resulting from the Government's failure to provide steam as required by the contract, and that a directive by the Contracting Officer that Petitioner tie into a specified alternative outlet for steam constituted a constructive change order for which Petitioner was entitled to compensation.

TIME EXTENSIONS FOR WEATHER

(4) Likewise, he found that various delaying factors forced Petitioner to work in severe weather which further delayed portions of the work, and it was held that Peti-

tioner was entitled to $56\frac{3}{4}$ days of time extension for delays caused by unusually severe weather.

ACCELERATION

(5) He further held that an acceleration order of December 7, 1961, was issued at a time when Petitioner was actually ahead of schedule, if all time adjustments to which Petitioner was entitled had been granted, and therefore the acceleration order amounted to a compensable change to the contract.

BACKFILL

(6) The Examiner held that a directive by the Contracting Officer that Petitioner remove and replace backfill which Petitioner had previously placed with prior approval of the Government Inspector constituted a change to the contract for which Petitioner was entitled to an equitable adjustment.

FELTING OF DAMPER BLADES

(7) The Examiner found that by the terms of the contract Petitioner was not required to install felting on the damper blades of the ventilation units and that the directive by the Contracting Officer to do so constituted a change to the contract for which Petitioner was entitled to compensation. By its decision of May 13, 1964, the full Commission reversed the Hearing Examiner's decision on this claim. In view of the small amount involved Petitioner accepts this determination.

RETAINAGE

(8) Finally, the Examiner ordered that the Contracting Officer promptly pay Petitioner the retainage amounting to approximately One Hundred Twenty-Four Thousand Dollars (\$124,000.00) which has never been paid.

16. The Commission remanded the case to the Contracting Officer with instructions to diligently proceed to a final settlement or a further decision in accordance with the decision of the Hearing Examiner of June 26, 1963, as

modified by the Commission's order of November 14, 1963, and its decision of May 13, 1964.

17. In accordance with the above directions by the Commission, the parties began negotiations for time extensions and an equitable adjustment of the contract price and had achieved substantial progress toward agreement.

18. On or about March 6, 1964, the Disbursing Officer sought the advice of the General Accounting Office on three minor questions, which office undertook on its own initiative to advise the Commission to deny all of the subject claims on December 5, 1966, No. B153841.

19. On March 27, 1967, the Commission advised Petitioner that it had exhausted its administrative recourse and the Commission would take no action in connection with these claims. (Exh. A).

20. Petitioner assigned its rights to amounts to be received under this contract to The First Citizens Bank of Dallas, Texas. September 12, 1961, a bona fide financial institution, pursuant to the Assignment of Claims Act of 1940, 54 Stat. 1029, 41 U.S.C. 15, 31 U.S.C. 203.

21. No other suit on these causes of action has been brought in any Court, nor has any claim been submitted to Congress for consideration.

WHEREFORE, on the basis of the allegations set forth herein, Petitioner demands that this Court:

(1) Immediately call for a certified copy of the record of the proceedings before the Hearing Examiner and Commission;

(2) That this Court uphold the final determination of the Commission and remand the case for negotiation of time extensions and of quantum with the right of appeal under the contract, or to this Court if agreement cannot be reached;

(3) Judgment in the amount of \$1,950,000.00, plus costs to abide the action.

[Signatures Omitted]

Exhibit A

UNITED STATES ATOMIC ENERGY COMMISSION

WASHINGTON, D. C. 20545

March 27, 1967

Hudson & Creyke
Attorneys at Law
New Hampshire Avenue and R Street
1744 R Street, N.W.
Washington, D. C. 20009
Attention: Geoffrey Creyke, Jr., Esq.

Dear Mr. Creyke:

This is in reply to your letter of March 16, 1967, asking for a brief statement of the position of the Atomic Energy Commission in connection with the claims of S&E Contractors, Inc. under Contract No. AT (30-3)-790 with this agency. You refer to opinion No. B-153841 of the Comptroller General.

The Atomic Energy Commission's view is that S&E Contractors, Inc. has exhausted its administrative recourse to the Commission. The Commission will take no action, in connection with the claims, inconsistent with the views expressed by the Comptroller General in his opinion of December 5, 1966—B-153841.

Sincerely yours,

B. E. HOLLINGSWORTH
General Manager

IN THE UNITED STATES COURT OF CLAIMS

No. 104-67

S&E CONTRACTORS, INC., *Plaintiff,*

v.

THE UNITED STATES, *Defendant.***Defendant's Answer**

For its answer to the petition, defendant admits, denies and alleges as follows:

1. Denies the allegations of paragraph 1 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

2. The allegations of paragraph 2 are conclusions of law which need not be answered.

3. Admits the allegations of the first sentence of paragraph 3 except the words "in the vicinity of Idaho Falls, Idaho", which are denied. Denies the allegations of the second sentence of paragraph 3 and alleges that the contract required work to be completed within 180 days of the contractor's receipt of notice to proceed, and that, pursuant to a pre-award agreement of the parties, it was agreed that the site would be made available to the contractor in stages until September 10, 1961, at no change in contract price or time for performance, which was to be completed within 180 days after August 10, 1961. In answer to the allegations of the third sentence of paragraph 3, defendant alleges that contract performance time was extended fifty-eight (58) days by change orders and a decision of the Contracting Officer; otherwise said allegations are denied.

4. Admits that U.S. Standard Forms 23 and 23A, with some modifications, formed part of the contract and that clauses cited in paragraph 4 were included in the contract,

but refers to said contract as the best evidence of its contents.

5. In answer to the allegations of paragraph 5, defendant denies that the contract itself provided for access to or availability of the site. Defendant admits that the terms and conditions of plaintiff's access to the site were contained in the parties' memorandum of understanding of August 2, 1961, but refers to said memorandum as the best evidence of its contents and denies so much of the allegations of paragraph 5 as purport to set out the terms of the memorandum except insofar as they may be borne out by the contents of said memorandum.

6. Admits the allegations of paragraph 6.

7. Admits the allegations of paragraph 7, except the figure "325" and alleges that the correct figure is "323".

8. Admits the allegations of the first sentence of paragraph 8, except the word "ten", which is denied. The allegations of the second sentence of paragraph 8 are conclusions of law which need not be answered.

9. Admits that on August 8, 1962 the Contracting Officer rendered a decision on plaintiff's claims, refers to said decision as the best evidence of its contents and denies the remaining allegations of paragraph 9 except insofar as they may be borne out by the contents of said decision.

10. Admits the allegations of paragraph 10.

11. Admits the allegations of the first sentence of paragraph 11, except the word "nine", which is denied. In answer to the allegations of the second sentence of paragraph 11, defendant admits that the Contracting Officer rendered a decision on November 8, 1962 but denies that the Contracting Officer rendered a "second supplemental decision"; defendant refers to said decision of November 8, 1962, as the best evidence of its contents and denies the remaining allegations of said sentence except insofar as

they may be borne out by the contents of said decision. Admits the allegations of the third sentence of paragraph 11.

12. Admits the allegations of paragraph 12 except the words "referenced in allegations 10 and 11", which are denied.

13. Admits that the Hearing Examiner rendered a decision on or about June 26, 1963 which sustained plaintiff's appeal in certain respects, refers to said decision as the best evidence of its contents and denies the remaining allegations of paragraph 13 except insofar as they may be borne out by the contents of said decision.

14. Admits that the Contracting Officer appealed the findings of the Hearing Examiner to the full Commission and that the Commission issued a memorandum and order dated November 14, 1963 and a decision dated May 13, 1964. Defendant refers to said memorandum and order and said decision as the best evidence of their respective contents and denies the remaining allegations of paragraph 14, except insofar as they may be borne out by the contents of said memorandum and order and said decision.

15. Admits that determinations were made with respect to claims mentioned in subparagraphs (1) through (8) of paragraph 15. As to the allegations of subparagraphs (1) through (8) of paragraph 15, defendant alleges as follows:

(1) Admits the allegations of the first and second sentences of subparagraph (1) as constituting a general description of the determinations of the Examiner and the Commission with respect to plaintiff's claim relating to site availability but refers to the said determinations as the best evidence of their respective contents. Denies the allegations of the third sentence of subparagraph (1) and alleges that the Commission directed that the 31-day time extension be diminished by an appropriate period of time

to allow for the period of mobilization, the plaintiff's readiness to proceed and the extent to which joint occupancy of the site caused no delay in plaintiff's work.

Answering further, defendant alleges that the aforesaid administrative decisions are not final under section 1 of the Act of May 11, 1954 (hereinafter referred to as the Wunderlich Act) in that the finding that plaintiff was delayed by the work of another contractor on the site is not supported by substantial evidence. Said decisions are also erroneous as a matter of law in concluding that plaintiff's operations were delayed by a constructive suspension of work order.

(2) Admits the allegations of subparagraph (2) (except the word "incidentally", which is denied), as constituting a general description of the Examiner's conclusion with respect to plaintiff's claim relating to Change Order No. 2 but refers to the Examiner's decision as the best evidence of its contents.

Answering further, defendant alleges that the aforesaid decision is not final under section 1 of the Wunderlich Act in that the Examiner's decision that the parties did not negotiate a binding contract respecting the amount to be paid and the extension of time to be allowed for the work done pursuant to the Change Order No. 2 is not supported by substantial evidence. Said decision is also erroneous as a matter of law.

(3) Admits the allegations of subparagraph (3) as constituting a general description of the Examiner's decision with respect to plaintiff's claim relating to the furnishing of steam by defendant but refers to the Examiner's decision as the best evidence of its contents.

Answering further, defendant alleges that the aforesaid decision is erroneous as a matter of law in that said decision misinterprets the nature and extent of defendant's contractual obligation to furnish steam. Said decision is

not final under section 1 of the Wunderlich Act in that the Examiner's findings that plaintiff was delayed through defendant's negligence and was not itself negligent are not supported by substantial evidence.

(4) Admits that the Examiner found that plaintiff was entitled to a time extension of $56\frac{3}{4}$ days for bad weather but otherwise denies the allegations of subparagraph (4) and refers to the Examiner's decision as the best evidence of its contents.

Answering further, defendant alleges that the aforesaid decision is not final under section 1 of the Wunderlich Act in that the Examiner's finding that plaintiff encountered severe weather and his finding that plaintiff was delayed on account of such weather are not supported by substantial evidence. In addition the Examiner's holding that the type of weather encountered at the site constituted grounds for a time extension in excess of five days and his holding that defendant was at fault in compelling plaintiff to work during periods of inclement weather are erroneous as a matter of law.

(5) Admits the allegations of subparagraph (5) as constituting a general description of the holding of the Examiner with respect to plaintiff's claim that the Contracting Officer's order of December 7, 1961 was a compensable change but refers to the Examiner's decision as the best evidence of its contents.

Answering further, defendant alleges that the aforesaid holding is erroneous as a matter of law in that the Contracting Officer's order of December 7, 1961, did not entitle plaintiff to increased compensation for the reason that plaintiff was behind schedule on that date and an acceleration order was therefore permissible under paragraph GC-09 of the contract.

(6) Admits the allegations of subparagraph (6) as constituting a general description of the Examiner's holding with

respect to plaintiff's claim for removal and replacing of backfill but refers to the Examiner's decision as the best evidence of its contents.

Answering further, defendant alleges that the aforesaid holding is not final under section 1 of the Wunderlich Act in that the Examiner's finding that the defects in the backfill did not result from plaintiff's delay in placing it is not supported by substantial evidence and is erroneous as a matter of law in that, contrary to the Examiner's finding, defendant was not liable because portions of the contract work were performed during the winter.

(7) The allegations of subparagraph (7) do not purport to be, and are not, allegations of material fact. Therefore, they need not be answered.

(8) Admits the allegations of subparagraph (8) except the allegations following the word "retainage", which are denied.

Answering further, defendant alleges that plaintiff has been paid the sum of \$92,428.51 by defendant subsequent to the date of the Examiner's decision, and that defendant is justly entitled to retain the balance as set-offs against debts owed by plaintiff to defendant. Insofar as the Examiner's decision held that defendant is not so entitled, said decision is erroneous as a matter of law.

16. Admits that the Commission remanded the case to the Contracting Officer, refers to the Commission's decision as the best evidence of its contents and denies the allegations of paragraph 16 except insofar as they may be borne out by the contents of said decision.

17. Admits the allegations of paragraph 17 except the words "and had achieved substantial progress toward agreement," which are denied for lack of knowledge or information sufficient to form a belief as to the truth thereof.

18. Denies the allegations of paragraph 18. Answering further, defendant alleges that on March 6, 1964, the Certi-

fying Officer, Schenectady Naval Reactors Office, Atomic Energy Commission, requested a decision from the General Accounting Office as to whether a voucher for payment to the plaintiff in partial liquidation of the Commission's decision could be certified for payment, and that, on December 5, 1966, in decision No. B-153841, the General Accounting Office advised the Certifying Officer that the voucher could not be so certified because plaintiff had no valid claim for additional funds under the contract.

19. Admits the existence of the letter referred to in paragraph 19. Answering further, defendant alleges that said letter is not a part of the administrative record in this case and cannot be considered by the Court in the adjudication of this case.

20-21. Denies the allegations of paragraphs 20 and 21 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

22. Denies all allegations of the petition not expressly admitted herein.

FIRST AFFIRMATIVE DEFENSE

23. If, and to the extent that it should be determined that any contractual disputes decisions are not final and/or further evidentiary proceedings are required in this matter, such proceedings must be prosecuted pursuant to the contractual disputes agreement of the parties, and in no other forum.

WHEREFORE, defendant demands that plaintiff's petition be dismissed, and that defendant be granted such other and further relief as may be just and proper.

[Signatures Omitted]

IN THE
UNITED STATES COURT OF CLAIMS

No. 104-67

(Filed September 26, 1969)

S&E CONTRACTORS, INC. -v.
THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT*
ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT

Geoffrey Creyke, Jr., attorney of record for plaintiff.
Hudson and Creyke and Locke; Purnell, Boren, Laney & Neely, of counsel.

James F. Merow, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant. *Edward M. Jerum* and *Vasil S. Vasiloff*, of counsel.

Opinion

WHITE, Commissioner: This is one of the many cases involving Government contracts in which the court has been called upon to review decisions rendered by Government contracting agencies. This case is unique, however, in that here the contractor is taking the position that it is entitled to a summary judgment upon the basis of favorable decisions on its claims previously rendered by the agency with which it contracted, while the Government takes the somewhat paradoxical position that the particular decisions by its own agency were improper.

Cross-motions for summary judgment have been filed by the parties. It is my opinion that the plaintiff's motion

* The opinion and recommended conclusion of law are submitted pursuant to the order of reference and Rule 166(c). The facts pertinent to the disposition of the cross-motions are stated in the opinion.

should be allowed and judgment should be entered for the plaintiff on the issue of the defendant's liability, and that the defendant's cross-motion should be denied.

I. INTRODUCTION

This case involves several claims that arose under Contract No. AT(30-3)-790 between the plaintiff and the defendant (represented by the Atomic Energy Commission). Contract No. AT(30-3)-790 ("the contract") called for the construction by the plaintiff of a testing facility for the Atomic Energy Commission ("the Commission") at the National Reactor Test Station in Idaho. The testing facility consisted of a large concrete basin and accompanying structures. The preliminary excavation work at the site of the testing facility was performed by a separate contractor, Nelson Bros.

The contract was awarded to the plaintiff on August 4, 1961, and notice to proceed with the work under the contract was given to the plaintiff on August 10, 1961. (Bids for the performance of the work under the contract had been opened on June 20, 1961, but the award of the contract to the plaintiff as the lowest responsible bidder was delayed because of difficulties encountered by Nelson Bros. in connection with the excavation of the site for the testing facility.)

Under the original provisions of the contract, the plaintiff was to receive \$1,272,000 as a fixed price for the performance of the work, and the work was to be completed within 180 days after the issuance of the notice to proceed. However, six change orders were issued during the life of the contract; and they increased the contract price to \$1,364,794.70 and extended the time for the completion of the work from February 6, 1961, to March 23, 1962. The work was actually completed, and was accepted by the Commission, in the latter part of June 1962.

The petition refers to eight claims which were considered by the contracting officer, by a hearing examiner, and by

the Commission itself, and on which the plaintiff ultimately failed to receive the desired relief from the administrative agency. However, the petition indicates that the plaintiff has abandoned one of the claims, referred to as "Felting of Damper Blades."

The nature of the remaining seven claims, and the actions that were taken on such claims by the contracting officer, the hearing examiner, and the Commission, will be summarized in parts II-VIII of this opinion.

II. THE "ACCESS" CLAIM

Under the provisions of the contract, as supplemented by a memorandum of understanding between the parties, the plaintiff was to be afforded the opportunity "to proceed with all work in the major portion of the westerly half of the building" from and after the issuance of the notice to proceed on August 10, 1961.

Asserting that the activities of Nelson Bros., the separate excavation contractor, restricted the plaintiff's access to the construction site during the period between August 10 and September 10, 1961, and thus prevented the plaintiff from proceeding "with all work in the major portion of the westerly half of the building" during such period, the plaintiff submitted to the contracting officer a request for an equitable adjustment under the "suspension of work" provision of the contract. That provision constituted paragraph 32 of the general provisions of the contract, and stated in part as follows:

The Contracting Officer may by written order direct the Contractor to suspend all or any part of the work for such period of time as may be determined by the Contracting Officer to be necessary or desirable for the convenience of the Government. If such suspension unreasonably delays the progress of the work and causes additional expense or loss to the Contractor in the performance of the work, not due to the fault

or negligence of the Contractor, an equitable adjustment in the contract price and time for performance shall be made in accordance with the agreement of the parties, and the contract shall be modified in writing accordingly * * *. A failure to agree on an equitable adjustment under this clause shall be deemed to be a dispute within the meaning of the clause of this contract entitled "Disputes".

In a decision dated August 8, 1962, the contracting officer denied the plaintiff's claim for an equitable adjustment under the "suspension of work" provision of the contract. The contracting officer determined, in effect, that the plaintiff had not been adversely affected in the performance of the work because of the plaintiff's "inability * * * to have unlimited, unrestricted and exclusive access to the construction site during the period beginning August 10, 1961, and ending September 10, 1961."

The plaintiff took an appeal to the Commission from the contracting officer's determination. The appeal was taken under the "disputes" provision of the contract, which was similar to the standard paragraph on the subject of disputes customarily found in Government construction contracts, except that appeals by the contractor from decisions of the contracting officer concerning questions of fact were to be taken to the Commission rather than to the individual head of a department or agency, and the Commission had not, at the time, established a board of contract appeals to act for it on contract disputes.

The Commission referred the plaintiff's appeal to a hearing examiner for the holding of a hearing and the preparation of a report. The hearing examiner's report was issued under the date of June 26, 1963.

In his report, the hearing examiner found as a fact that because the operations of Nelson Bros. during the period August 10 - September 10 unduly restricted the plaintiff's

access to the basin, the major portion of the basin was not available for "all" work on the part of the plaintiff at any time between August 10 and September 10, 1961. On that basis, the hearing examiner further found that the work was suspended under paragraph 32 of the general provisions of the contract until September 10, when the plaintiff obtained unrestricted access to the basin and it became available for "all" work on the part of the plaintiff. The hearing examiner concluded, therefore, that the plaintiff was entitled to a 31-day extension of the time fixed in the contract for the completion of the work, and was also "entitled to an equitable adjustment for the costs entailed by the delay." The hearing examiner did not, however, compute the monetary amount of the equitable adjustment which the plaintiff was to receive.

The plaintiff's "access" claim was considered by the Commission in a decision that was rendered on May 13, 1964. The Commission did not accept the hearing examiner's conclusion that the plaintiff's work under the contract was wholly suspended until September 10, 1961, because of the activities of Nelson Bros. On the other hand, the Commission held, in effect, that there was some unreasonable interference by Nelson Bros. with the plaintiff's work during the period between August 10 and September 10, 1961, and that an equitable adjustment was proper to compensate the plaintiff for the delay in its operations attributable to such interference by Nelson Bros.

The Commission regarded the record before it as inadequate for the making of a determination regarding the extent to which the activities of Nelson Bros. actually interfered with the plaintiff's work during the period between August 10 and September 10, 1961. Consequently, the Commission remanded the matter to the contracting officer for the conduct of negotiations with the plaintiff looking toward a settlement relative to the amount of the equitable adjustment on the plaintiff's "access" claim, and directed that, if a settlement could not be arranged, the

contracting officer should render a decision on the amount of the equitable adjustment (which would be subject to another appeal by the plaintiff to the Commission under the "disputes" provision of the contract).

For reasons that will be explained in part IX of this opinion, the plaintiff never received any administrative relief on its "access" claim under the Commission's decision.

III. THE "CONCRETE" CLAIM

The contract contained the standard "changes" provision generally found in Government construction contracts. Acting under the authority of that provision, the contracting officer on October 2, 1961, issued Change Order No. 2, which effected a substantial change in the specifications relating to the concrete work. The change order provided that "the contract price will be increased in the amount of \$90,429.00 * * * and the contract completion date will be extended by 30 calendar days"; and that "a contract modification will be executed to formalize this change in contract price and time."

The plaintiff submitted to the contracting officer a claim which, as subsequently modified, requested that the time for the completion of the work under the contract be extended 150 days on account of the issuance of Change Order No. 2, and that the contract price be increased by the amount of \$139,807.

The contracting officer held that the time and price adjustments provided for in Change Order No. 2 were the result of prior negotiations and reflected an agreement between the plaintiff and the Government; and, accordingly, that the plaintiff was not entitled to any increase in the time extension of 30 calendar days, or to any increase in the price adjustment of \$90,429, provided for in Change Order No. 2.

The plaintiff took an appeal from the contracting officer's decision to the Commission under the "disputes" provision

of the contract. This appeal was referred by the Commission to the hearing examiner previously mentioned.

The plaintiff's "concrete" claim was discussed in the hearing examiner's report of June 26, 1963. The hearing examiner found as a fact that the parties did not intend to be bound by the negotiations which preceded the issuance of Change Order No. 2; and, therefore, that Change Order 2 was a unilateral change order and did not bind the plaintiff, either with respect to the 30-day time extension or the \$90,429 price adjustment provided for in the order. The hearing examiner said that a time extension "of at least 60 days," and perhaps more, should have been granted on the plaintiff's "concrete" claim.

The hearing examiner indicated that the plaintiff's "concrete" claim should be remanded to the contracting officer for the conduct of negotiations with the plaintiff looking toward a settlement of this claim or, in the absence of an agreed settlement, for the making of a new decision by the contracting officer respecting the time and monetary adjustments to which the plaintiff was entitled on the "concrete" claim under the "changes" provision of the contract.

The plaintiff's "concrete" claim was considered by the Commission in a memorandum and order dated November 14, 1963. The Commission accepted the hearing examiner's factual finding that the parties did not intend to be bound by the preliminary negotiations which preceded the issuance of Change Order No. 2, and also left outstanding the hearing examiner's proposal that this claim be remanded to the contracting officer for the negotiation of an agreed settlement with the plaintiff, if possible, or the issuance of a new decision by the contracting officer on the amount of the equitable adjustments as to time and money which the plaintiff was entitled to receive on the "concrete" claim under the "changes" provision of the contract.

The purpose of the remand was never accomplished, for the reasons stated in part IX of this opinion.

IV. THE "STEAM" CLAIM

Paragraph SC-07 of the contract specifications provided in part that "Steam will be furnished by the Commission for construction and temporary heating purposes at no cost to the Contractor providing the requirements do not overload the available service or interfere with Commission operations." During the course of the performance of the work under the contract, the plaintiff submitted to the contracting officer a claim based upon the alleged failure of the Commission to provide steam for weather protection and concrete curing during the fall of 1961 and the early winter of 1961-62.

The contracting officer denied the plaintiff's "steam" claim. In doing so, the contracting officer held that if the completion of the work under the contract "was delayed by any circumstances or factors related to the availability of Government-furnished steam, such delay was the result of fault or negligence on the part of the Contractor."

The plaintiff took an appeal to the Commission under the "disputes" provision of the contract from the contracting officer's action in denying the plaintiff's "steam" claim. The Commission referred the matter to the hearing examiner previously mentioned.

In his report, the hearing examiner found as a fact that the Commission had an adequate supply of steam at the jobsite for the use of the plaintiff—without overloading the available service or interfering with the operations of the Commission—by November 11, 1961; that the contract contemplated that such steam would be made available to the plaintiff at manhole No. 3; that almost immediately after the steam was turned on, an anchor block and expansion joints broke down at manhole No. 3 and, as a consequence, the steam was turned off; that the Commission thereafter proceeded with repair work at manhole No. 3; that everyone expected that this work would be successfully carried to completion within a short period of time, and the

plaintiff was assured a number of times during the next 6 weeks that steam would soon be available at manhole No. 3, but that the repair work was not completed until April 1962, due to negligence on the part of the Commission; and that in January 1962, the plaintiff abandoned hope of receiving steam from manhole No. 3 and tied into another manhole on the other side of the basin. The hearing examiner further found that 25 days of delay in the completion of the work under the contract resulted directly from the lack of steam.

In addition, the hearing examiner stated in his report that the Commission's action in making it necessary for the plaintiff to obtain steam at a source other than manhole No. 3 amounted to a constructive change order; and that the plaintiff was entitled to an equitable adjustment to cover the additional cost involved in obtaining steam from a source other than manhole No. 3. The hearing examiner did not compute the amount of the monetary adjustment due the plaintiff.

The plaintiff's "steam" claim was mentioned by the Commission in its memorandum and order dated November 14, 1963, and in its decision dated May 13, 1964. The Commission accepted the hearing examiner's finding that the plaintiff was delayed by, and was entitled to a time extension because of, the Commission's failure to furnish steam. However, the Commission indicated that there was an "arithmetical" inconsistency between the hearing examiner's conclusion that the delays in the completion of the work under the contract attributable to the lack of steam totaled 25 days, on the one hand, and certain specific findings made by the hearing examiner with respect to the days when such delays occurred. The Commission itself did not make any computation regarding the extent to which the plaintiff was delayed in the performance of the work under the contract by the Commission's failure to furnish steam in accordance with the provisions of the contract.

The Commission did not refer specifically to the hearing examiner's conclusion that the plaintiff was entitled to an

equitable adjustment under the "changes" provision of the contract because of the constructive change relative to the source from which the plaintiff was required to obtain the steam. Hence, it is reasonable to infer that the Commission accepted this portion of the hearing examiner's report.

The plaintiff's "steam" claim was covered by general language in the Commission's memorandum and order dated November 14, 1963, and the Commission's decision dated May 13, 1964, to the effect that the entire proceeding was remanded to the contracting officer with directions "to effect promptly equitable adjustments and payments to which the appellant [plaintiff] is entitled," and with the further directive that in the event of disagreement between the contracting officer and the plaintiff concerning a particular adjustment or payment, "the contracting officer will make a determination pursuant to the disputes clause of the contract, subject to appeal."

As indicated in part IX of this opinion, the purpose of the remand was never accomplished.

V. THE "WEATHER" CLAIM

During the course of the construction work under the contract, the plaintiff submitted to the contracting officer a request which, as subsequently amended, asked that the time for the completion of the work be extended for more than 100 days on account of adverse weather conditions. The contracting officer granted this request only to the extent of 4 days. Otherwise, the request was denied on the ground that the weather which the plaintiff encountered during the progress of the work under the contract was not any more severe than the weather which the plaintiff should reasonably have expected to encounter in the geographical area where the work was being performed.

The plaintiff took an appeal to the Commission under the "disputes" provision of the contract from the contracting officer's denial of the major portion of the plaintiff's "weather" claim.

This claim was included in the referral by the Commission to the hearing examiner, and it was discussed in the hearing examiner's report. The hearing examiner set out a considerable quantity of data concerning weather conditions where the work under the contract was performed; and the hearing examiner found that unusually severe weather directly caused 56-3/4 days of delay in the plaintiff's operations under the contract.

The plaintiff's "weather" claim was considered by the Commission in its memorandum and order of November 14, 1963. The Commission accepted the hearing examiner's finding that the plaintiff's operations were delayed by unusually severe weather. However, the Commission said that the hearing examiner's conclusion that the delays caused by unusually severe weather totaled 56-3/4 days was inconsistent with the hearing examiner's detailed findings concerning the specific days on which the plaintiff's operations were adversely affected by unusually severe weather. The Commission then indicated that it was remanding the "weather" claim to the contracting officer "for the purpose of ascertaining whether an unambiguous foundation may be achieved on which the parties may negotiate a final settlement or on which the contracting officer may reach a more detailed decision * * *."

No final action was ever taken by the agency on the plaintiff's "weather" claim, for the reasons stated in part IX of this opinion.

VI. THE "ACCELERATION" CLAIM

Paragraph GC-09 of the contract specifications required the plaintiff, within 5 days after commencing the work under the contract, to prepare and submit to the Commission for approval "a practicable schedule * * * in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion at any given time"; and it further required the plaintiff to furnish such personnel and equipment, and to work for

such hours, "as may be necessary to insure the prosecution of the work in accordance with the approved progress schedule." The paragraph further provided in part as follows:

• • • If, in the opinion of the Commission, the Contractor falls behind the progress schedule, the Contractor shall take such steps as may be necessary to improve his progress and the Commission may require him to increase the number of shifts and/or overtime operations, days of work and/or the amount of construction plant, all without additional cost to the Government.

The original progress schedule, as prepared by the plaintiff and approved by the Commission, was revised in October 1961 to reflect the 30-day extension of time for the completion of the work under the contract granted in Change Order No. 2; and the progress schedule was further revised in November 1961 to reflect a 15-day extension of time granted in Change Order No. 3.

On December 5, 1961, the contracting officer determined, by projecting the work completed as of that date against the revised progress chart, that the plaintiff was 18 percent behind schedule on an overall basis and was 50 percent behind schedule on the concrete work in the basin. Two days later, on December 7, 1961, the contracting officer invoked paragraph GC-09 of the general conditions of the contract and directed that the plaintiff work around-the-clock thereafter. Previously, the plaintiff was generally working a 5-day week, with a main day shift of 8 hours, a swing-shift, and a graveyard shift for maintenance.

The plaintiff contended that if the progress chart, as revised in October and November of 1961, had been further revised to take into account the extensions of time to which the plaintiff was entitled (according to the plaintiff's contentions, as summarized in parts II-V of this opinion), the

plaintiff was actually on schedule in early December 1961 and, accordingly, that the contracting officer's directive for around-the-clock work was an acceleration order which entitled the plaintiff, under the "changes" provision of the contract, to an equitable adjustment covering all the additional costs resulting from the acceleration.

The contracting officer did not make any separate findings or render any separate decision on the plaintiff's "acceleration" claim. However, the contracting officer did deny the plaintiff's claims for extensions of time on which the "acceleration" claim was based.

In the report which the hearing examiner made on the plaintiff's appeals to the Commission, the hearing examiner said that the contracting officer's calculations did not take into account certain time extensions which should have been granted prior to the time when the "acceleration" order was issued, i.e., 31 days in connection with the plaintiff's "access" claim, at least 60 days in Change Order No. 2 (rather than the 30-day extension actually granted in that order), 12 days for lack of steam, and 10 days on account of unusually severe weather. The hearing examiner further said that if the additional time extensions to which the plaintiff was entitled as of early December 1961 were taken into account, the plaintiff was well ahead of schedule in the performance of the work under the contract as of December 7, 1961. Accordingly, the hearing examiner concluded that the contracting officer's directive of December 7 for around-the-clock work was a change order for acceleration which entitled the plaintiff to an equitable adjustment upward in the contract price to compensate the plaintiff for the extra expense resulting from the acceleration. The hearing examiner did not attempt to compute the amount of the plaintiff's extra expense flowing from the acceleration order.

The Commission did not specifically discuss the plaintiff's "acceleration" claim, as such, in the Commission's

memorandum and order dated November 14, 1963, or in the Commission's decision dated May 13, 1964. It is reasonable to infer, therefore, that the Commission accepted the part of the hearing examiner's report dealing with the "acceleration" claim.

Accordingly, the "acceleration" claim is to be regarded as having been included within the scope of the Commission's action in remanding the entire proceeding to the contracting officer with a directive "to effect promptly equitable adjustments and payments to which the appellant [plaintiff] is entitled," and indicating that in the event of a disagreement concerning a particular adjustment or payment, "the contracting officer will make a determination pursuant to the disputes clause of the contract, subject to appeal."

As stated heretofore in connection with other claims, the purpose of the remand was never accomplished.

VII. THE "BACKFILL" CLAIM

Subparagraph (h) of paragraph TP-04 of the contract specifications provided in part as follows:

(h) *Moisture Control*: The maximum allowable moisture content of unplaced fill material shall be 20% of the dry weight of the material. Whenever the moisture content of material exceeds this limit, dry the material to acceptable moisture content before depositing. Whenever moisture content of placed material is raised, by rain or otherwise, above the specified limit, suspend compaction operations until fill has dried to acceptable moisture content. * * *

When the plaintiff finished laying the slabs of the concrete basin about the middle of October 1961, it backfilled to the level of the slabs, using for this purpose fill material taken from the spoil pile resulting from the operations of Nelson Bros., the separate excavation contractor. Later,

the contracting officer ordered the backfill removed and replaced.

A claim submitted by the plaintiff under the "changes" provision of the contract was denied by the contracting officer; the plaintiff appealed to the Commission under the "disputes" provision of the contract; and the Commission referred the matter to the hearing examiner previously mentioned.

The hearing examiner found as a fact that when the backfill was initially put in place, it was approved by a Government inspector as having a proper moisture content; that when the work was delayed for reasons previously discussed in this opinion, the fill became water-logged and frozen; that the fill was then reinspected; and that the plaintiff was required to remove it and replace it from a source other than the Nelson Bros. spoil pile, which in the meantime had become unsuitable for use as fill because of excessive moisture. The hearing examiner concluded that the contracting officer's directive that the fill (which had been proper when installed) be removed, and the related directive to the effect that such fill should be replaced with material from a source other than the Nelson Bros. spoil pile, were constructive change orders which entitled the plaintiff to an equitable adjustment. The hearing examiner did not compute the amount due the plaintiff because of these constructive changes.

The Commission did not discuss the merits of the plaintiff's "backfill" claim in its memorandum and order of November 14, 1963, or in its decision of May 13, 1964. It is inferred, therefore, that the portion of the hearing examiner's report dealing with this claim was accepted by the Commission, and, accordingly, that this claim was within the scope of the Commission's action in remanding the entire proceeding to the contracting officer "to effect promptly equitable adjustments and payments to which the appellant [plaintiff] is entitled," and with an instruction

that in the event of a disagreement concerning the adjustment or payment on a particular claim, the contracting officer should "make a determination pursuant to the disputes clause of the contract, subject to appeal."

The plaintiff's "backfill" claim, like the other claims previously discussed in this opinion, was never processed to a final conclusion by the administrative agency.

VIII. THE "RETAINAGE" CLAIM

In the proceedings before the hearing examiner, the plaintiff contended that the contracting officer was retaining a total of \$92,794.70 which the contracting officer had determined was due the plaintiff under change orders issued during the course of the work under the contract; that the sum of \$8,000 otherwise due the plaintiff under the contract was being retained by the contracting officer against the possibility that the Government might be held liable to another contractor for delay in making the concrete basin (which the plaintiff constructed) available to such contractor for the performance of work under a contract other than the one involved here; and that the contracting officer was retaining the sum of \$22,280 on the ground that the plaintiff owed such amount to a supplier of aggregate that was used in the performance of the contract.

With respect to the amounts previously found by the contracting officer to be due under change orders, the hearing examiner stated in his report that "all payments withheld for work under change orders are now due and payable."

In connection with the \$8,000 allegedly withheld because of the possibility that the Government might subsequently be held liable to another contractor, the hearing examiner stated in part as follows:

• • • *If this is the case*, this money should be paid now. It is elemental that the contracting officer has no authority to prejudge a law suit and assess damages. • • • [Emphasis supplied.]

With regard to the plaintiff's allegation relative to the withholding of \$22,280 on the ground that the plaintiff had failed to pay the full amount due a supplier of aggregate, the hearing examiner stated in part as follows:

• • • *If this is true*, this amount should be paid now for the same reason. [Emphasis supplied.]

Summing up his discussions concerning the plaintiff's "retainage" claim, the hearing examiner stated in part as follows:

• • • Finally, *if the appellant's [plaintiff's] assertions are correct*, it appears that approximately \$124,000.00 is now withheld, which under this decision is due and owing. Whatever the amount is, and it is a matter of arithmetical computation, it should be paid forthwith. • • • [Emphasis supplied.]

In its memorandum and order dated November 14, 1963, the Commission stated that it left "undisturbed" the portion of the hearing examiner's report dealing with the plaintiff's "retainage" claim.

The petition in the present case refers to "the retainage amounting to approximately One Hundred Twenty-Four Thousand Dollars (\$124,000.00) which has never been paid." However, in the brief supporting its motion for summary judgment, the plaintiff states with respect to the "retainage" claim that there is no issue involved here which has to be decided by the court at this time, since the plaintiff's motion for summary judgment seeks only a review of the administrative decisions, and a judicial determination of the defendant's liability, on the other claims asserted by the plaintiff.

In connection with the "retainage" claim, perhaps it should be mentioned that, according to information received from the parties, the amounts determined by the contracting officer to be due under change orders have been paid

to the plaintiff during the pendency of the present litigation.

With respect to the other items of \$8,000 and \$22,280 allegedly retained by the contracting officer, it will be noted that the pronouncements by the hearing examiner (which were left "undisturbed" by the Commission) did not constitute unequivocal administrative decisions of the sort that can appropriately be subjected to judicial review. Hence, as the plaintiff indicates in its brief, these particular matters are outside the scope of the present review proceedings.

IX. ACTION BY GENERAL ACCOUNTING OFFICE

In its memorandum and order dated November 14, 1963, the Commission directed the contracting officer "to effect promptly equitable adjustments and payments to which the appellant [plaintiff] is entitled."

Subsequently, on March 4, 1964, a certifying officer in the employ of the Commission requested advice from the General Accounting Office ("GAO") with respect to the certification of a voucher for the making of a payment in the amount of \$32,297.73 to the plaintiff under the contract. The amount set out in the voucher was said to represent three sums withheld from the plaintiff, i.e., \$22,280 withheld because the plaintiff allegedly owed such amount to a supplier of aggregate, \$8,366.19 withheld because of the Government's possible liability to another contractor, and \$1,651.54 withheld because of an alleged indebtedness by the plaintiff to still another contractor for telephone services.

It will be noted that the voucher which the certifying officer submitted to the GAO for advice covered two of the items that had been involved in the plaintiff's "retainage" claim before the hearing examiner and the Commission (although there was a variance in the amount of one of

these items), but it did not cover any proposed payment on any of the seven claims that are involved in the present review proceedings.

On December 5, 1966, the GAO advised the certifying officer in decision No. B-153841 (46 Comp. Gen. 441) that it would be improper to certify the voucher which had been submitted to the GAO, because (according to the GAO) the plaintiff did not have a valid claim for any additional compensation under the contract.

The GAO reviewed at great length the hearing examiner's report and the Commission's actions on all of the plaintiff's claims, including the "access," "concrete," "steam," "weather," "acceleration," and "backfill" claims, which are summarized in parts II-VII of this opinion. The GAO expressed the opinion that the administrative decisions favorable to the plaintiff in connection with these claims were not supported by substantial evidence.

Relying on the opinion expressed by the GAO, the Commission thereafter refused to take any further action on the plaintiff's claims. As a consequence, the plaintiff has never received the administrative relief which, according to the Commission's decisions, the plaintiff was entitled to receive on the claims described in parts II-VII of this opinion.¹

As the Supreme Court has said, respect should be accorded "the parties' rights to contract and to provide for their own remedies." *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966). In the contract that is before the court for consideration at the present time, the parties provided in pertinent part as follows

¹ As indicated elsewhere, it appears that part of the "retainage" claim—i.e., the item relating to amounts found by the contracting officer to be due under change orders—has been paid during the pendency of the present litigation.

with respect to the resolution of disputes that might arise under the contract:

(a) * * * [A]ny dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor [plaintiff]. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission * * * shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. * * *

(b) This "Disputes" Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

It will be noted that the plaintiff and the contracting officer provided in the contract that if they could not reach an agreement on a dispute concerning a question of fact arising under the contract, the dispute was to be decided by the contracting officer (notwithstanding his interest as one of the parties to the contract); and that his decision was to be final and conclusive unless *the plaintiff* appealed in writing to the Commission within 30 days. Obviously, the contracting officer would be in agreement with his own decision; and if the plaintiff did not indicate disagreement with such decision within a 30-day period, it was to be finally and conclusively established that the plaintiff was in agreement with the contracting

officer's decision, so that the situation at the end of the 30-day period would be one wherein both parties had reached an agreement on a matter which initially constituted a controversy between them.

Similarly, the plaintiff and the contracting officer provided in the contract that in the event of an appeal *by the plaintiff* to the Commission from a decision by the contracting officer, the decision of the Commission was to be final and conclusive "unless determined by a court of competent jurisdiction" to be invalid. Here, again, the Commission would obviously be in agreement with its own decision; and if the plaintiff was in disagreement with such decision, it was incumbent upon the plaintiff to go to a court of competent jurisdiction and attempt to have the Commission's decision overturned. In the absence of an attempt by the plaintiff to obtain judicial relief, it was to be finally and conclusively established that the plaintiff was in agreement with the Commission's decision, which would then constitute a mutually satisfactory solution of a onetime controversy and would be binding on both parties.

It would be wholly unreasonable to suppose that the plaintiff, when it agreed to the inclusion of the "disputes" provision in the contract, intended to agree that the Commission, after having made decisions favorable to the plaintiff at the conclusion of quasi-judicial proceedings under the "disputes" provision, could then repudiate its own decisions, as was done by the Commission in the present case. On the contrary, the action of the Commission in repudiating its own decisions made under the "disputes" provision of the contract must be regarded as a breach of that provision.²

² It should be mentioned in this connection that the record is wholly devoid of any indication that the administrative decisions favorable to the plaintiff were tainted by fraud or overreaching, or that the Commission lacked statutory authority to effectuate its decisions.

The Commission's purported justification for its refusal to carry out its own decisions made under the "disputes" provision of the contract on the plaintiff's claims discussed in parts II-VII of this opinion was, of course, the opinion expressed by the GAO in its decision No. B-153841. That was too slender a reed, however, to support the Commission's repudiation of its own decisions.

With respect to the action of the GAO in reviewing the administrative decisions rendered under the "disputes" provision of the contract on the plaintiff's "access," "concrete," "steam," "weather," "acceleration," and "back-fill" claims, it must be noted that the parties had contracted for a judicial review of such decisions in appropriate instances, and not for a review by the GAO.

In this connection, it is of more than passing interest that when the matter of proposed legislation to correct the situation resulting from the Supreme Court's decision in *United States v. Wunderlich*, 342 U.S. 98 (1951), was under consideration, the GAO suggested to Congress that such legislation should expressly authorize the GAO to invalidate decisions rendered by contracting agencies under the "disputes" provisions of Government contracts if the GAO should find such decisions to be "fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence."³ However, this suggestion was objected to by contracting agencies of the Government and also by persons engaged in the business of contracting with the Government,⁴ and the proposal was ultimately rejected by Congress. It was stated in the House report

³ H.R. 1839, 83d Cong., 1st Sess., which represented the views of the GAO as to appropriate corrective legislation.

⁴ See *Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H.R. 1839, S.24, H.R. 3634, and H.R. 6946, 83d Cong., 1st and 2d Sess., ser. 12 (1954).*

on the bill⁵ which Congress eventually enacted as the so-called Wunderlich Act (41 U.S.C. §§ 321-22) that "there is no intention of setting up the General Accounting Office as a 'court of claims.'" H.R. REP NO. 1380, 83d Cong., 2d Sess., p. 7 (1954).

The House report cited at the end of the preceding paragraph further said (pp. 6-7) that the proposed legislation would not "add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit" It is pertinent, therefore, to consider the question of the jurisdiction which the GAO had prior to the enactment of the Wunderlich Act to review, "in the course of a settlement or upon audit," administrative decisions rendered under the "disputes" provisions of Government contracts.

Another court which had occasion to pass upon the question mentioned in the last sentence of the preceding paragraph reached the following conclusion with respect to it:

The powers of the Comptroller General are extensive and broad. But he does not, *absent fraud or over-reaching*, have authority to determine the propriety of contract payments when the contracts themselves vest the final power of determination in the contracting executive department. . . . [James Graham Mfg. Co. v. United States, 91 F. Supp. 715, 716 (N.D. Calif. 1950). Emphasis supplied.]

In its decision No. B-153841, the GAO referred (46 Comp. Gen. at page 453) to several statutory provisions as supposedly empowering the GAO to review the administrative decisions with which we are concerned in disposing of the present cross-motions for summary judgment.

⁵ S.24, 83d Cong.

For example, the GAO referred to 31 U.S.C. § 74, which authorizes disbursing officers or the heads of governmental agencies to apply to the Comptroller General for "his decision upon any question involving a payment to be made by them or under them," and to 31 U.S.C. § 82d, which authorizes certifying officers "to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification." In the present case, the submission to the GAO was by a certifying officer, it was acknowledged by the GAO (46 Comp. Gen. at p. 446) as having been made under 31 U.S.C. § 82d (i.e., as seeking advice on questions of law), and it presented a voucher which involved the proposed payment of three items totaling \$32,297.73 and which did not include any proposed payment to the plaintiff on any of the seven claims that are now under consideration. Therefore, except for matters of law relating to the payment of the three items in the voucher, the extensive discussion contained in the GAO's decision No. B-153841 was beyond the scope of the GAO's authority under 31 U.S.C. § 82d.

The GAO also referred to 31 U.S.C. § 71, which provides in part that "All claims and demands whatever . . . [against] the Government of the United States . . . shall be settled and adjusted in the General Accounting Office." This provision presupposes the submission directly to the GAO of claims and demands by persons asserting them against the Government—or the referral to the GAO by governmental agencies of claims and demands previously submitted to them—under circumstances where the submission or referral does not violate a contractual agreement between the claimant and the Government for another method of disposing of the claim. It certainly does not authorize the GAO to nullify the "disputes" provisions of Government contracts by preempting, on its own initiative, claims as to which the

parties have contracted for a quasi-judicial procedure, to be followed by judicial review in appropriate instances.

In addition, the GAO mentioned its authority under 31 U.S.C. § 71 to settle and adjust "all accounts whatever in which the Government of the United States is concerned," and said that under 31 U.S.C. § 44 and 31 U.S.C. § 2 (note) it is authorized to examine and audit the financial transactions of the Government. However, the pronouncements by the GAO concerning the administrative decisions on the plaintiff's claims discussed in parts II-VII of this opinion were not related to the settlement and adjustment of the Government's accounts, or to the auditing of the Government's financial transactions.

The conclusion seems inescapable that the GAO, in making the pronouncements concerning the supposed impropriety of the administrative decisions rendered under the disputes provision of the contract on the plaintiff's "access," "concrete," "steam," "weather," "acceleration," and "backfill" claims, was acting beyond the scope of its statutory authority and, in effect, was endeavoring on its own initiative to exercise a review function which the parties, in the contract, had reserved for the courts in appropriate instances.

It is not necessary in this case to determine the proper scope of the GAO's review if that agency were properly called upon, in the performance of its statutory functions, to review payments made or proposed pursuant to administrative decisions rendered under the "disputes" provision of the contract with which we are concerned. In this connection, however, it is pertinent to note again that in the "disputes" provision of this contract, the parties expressly contracted for the finality of appellate decisions rendered by the Commission on disputes concerning questions of fact, "unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not

supported by substantial evidence" (emphasis supplied). The parties evidently intended that the invalidation of administrative decisions on factual issues, rendered at the conclusion of quasi-judicial proceedings, should be surrounded by the due-process safeguards available only in the courts.

For the reasons previously stated in this part of the opinion, the pronouncements by the GAO did not provide any justification for the Commission's refusal to carry out the administrative decisions favorable to the plaintiff rendered under the "disputes" provision of the contract on the claims discussed in parts (I-VII of this opinion, and such unwarranted refusal must be regarded as a breach by the Commission of its contractual obligations.⁶

X. FUTURE PROCEDURE

A period of more than 5 years has elapsed since the Commission rendered its final decision of May 13, 1964, on the claims that are involved in the present review proceedings. Although the administrative determinations on such claims were favorable to the plaintiff, the latter has never received the relief which, according to the Commission, the plaintiff was entitled to receive on the claims now under consideration.

Consequently, we have here a case where the administrative procedure under the "disputes" provision of a Government contract has proved to be "inadequate" or "unavailable" for the final disposition of claims submitted by the contractor. This being so, the court may properly proceed—and should proceed—with the holding of a trial *de novo* in order finally to dispose of these claims without further undue delay by determining the amounts which the plaintiff is justly entitled to receive on such claims. See *United States v. Anthony Grace & Sons, Inc., supra*, 384 U.S. at pp. 429-30.

⁶ See footnote 2.

RECOMMENDED CONCLUSION OF LAW

Upon the foregoing opinion, which is adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover on its "access," "concrete," "steam," "weather," "acceleration," and "backfill" claims, and judgment is entered to that effect. The plaintiff's motion for summary judgment is allowed as to such claims, and the defendant's cross-motion for summary judgment is denied. The amount of the recovery will be determined in subsequent proceedings under Rule 131 (c), which will be combined with proceedings for the determination of the defendant's liability and the amount of the recovery (if any) on the plaintiff's "retainage" claim.

IN THE UNITED STATES COURT OF CLAIMS

No. 104-67

(Decided November 30, 1970)

S & E CONTRACTORS, INC. v. THE UNITED STATES

Geoffrey Creyke, Jr., attorney of record for plaintiff. *John P. Wiese, Hudson and Creyke*, and *Locke, Purnell, Boren, Laney & Neeley*, of counsel.

James F. Merow, with whom was *Assistant Attorney General William D. Ruckelshaus*, for defendant. *Edward M. Jerum*, and *Vasil S. Vasiloff*, General Accounting Office, of counsel.

Robert F. Keller, Assistant Comptroller General of the United States, filed a brief for the General Accounting Office as amicus curiae. *Paul G. Dembling*, General Counsel, General Accounting Office, and *Vasil S. Vasiloff*, attorney, General Accounting Office, were with him on the brief.

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ON DEFENDANT'S REQUEST FOR REVIEW OF THE COMMISSIONER'S
RECOMMENDED OPINION

NICHOLS, Judge; delivered the opinion of the court:

This is a contract case before us on defendant's request for review of our commissioner's recommended opinion. Stripped of subordinate and extraneous issues, the central question presented is whether the "Wunderlich" Act, 41 U.S.C. §§ 321-22 (1964) (hereinafter referred to as the

Act), affords the Government a right to obtain judicial review—coextensive with that of the contractor—of decisions of administrative tribunals unfavorable to it, on contract claims made in the course of the standard “disputes” procedure under the Wunderlich Act.

On August 4, 1961, plaintiff S & E Contractors, Inc. contracted with the Atomic Energy Commission (AEC) to build a testing facility at the National Reactor Test Station in Idaho. Performance of this contract generated numerous claims which the contractor properly filed with the contracting officer; those decided adversely to the contractor were seasonably appealed to the AEC. Since at this time the AEC did not have a contract appeals board to represent it, the contractor, under the AEC’s then current procedures, was referred to a hearing examiner specially appointed to hear grievances and render findings of fact. Consequently, eight of plaintiff’s claims were sustained by the hearing examiner and remanded to the contracting officer for negotiation and settlement on damage questions. Contrary to this directive, the contracting officer petitioned the AEC to review the hearing examiner’s findings as to these eight claims. His petition was accepted and the AEC’s review resulted in an affirmance of the hearing examiner’s findings on seven of the eight claims. (The Government explains that the AEC did not actually affirm on these seven claims, but rather it merely declined to exercise its certiorari-like discretion to rehear them. This procedural clarification is of no real importance to our analysis, however, because the Government conceded at oral argument that the AEC’s refusal to review these claims was itself sufficient to give the hearing examiner’s findings administrative finality).

Again the matter was remanded to the contracting officer for final settlement. This time, however, settlement discussions were interrupted and finally terminated by the intervention of the General Accounting Office (GAO). Our

commissioner found that an AEC certifying officer requested advice from the GAO with regard to the certification of a voucher for the making of payment on one of the successful claims. No mention was made nor was any advice solicited concerning paying out on the remaining claims. Despite the narrowness of this request, the GAO advised the AEC in decision No. B-153841 (46 Comp. Gen. 441 (1966)) that payment on *any* of the disputed claims would be improper because the AEC's findings as to these claims were not supported by substantial evidence and were erroneous on matters of law. In view of this decision, the AEC informed plaintiff that plaintiff had "exhausted its administrative recourse to the Commission. . . . [and that] no action [would be taken by the Commission], in connection with the claims, inconsistent with the views expressed by the Comptroller General in . . . B-153841."

This information impelled plaintiff to bring suit in this court. Cross motions for summary judgment supported *only* by arguments and counter-arguments regarding the evidential substantiality and the legal correctness of the AEC's findings and conclusions were submitted to our trial commissioner. He, however, chose to disregard these arguments in favor of other theories. Essentially his opinion recommends that the AEC's failure to implement its own decision made under the contract's disputes provision (which he terms a repudiation) "must be regarded as a breach of that provision." Moreover, he suggests that the GAO intervention on substantiality and on legal grounds exceeded its authority and that therefore decision No. B-153481 "was too slender a reed . . . to support the Commission's repudiation of its own decision." The commissioner granted plaintiffs' motion for summary judgment, and rather than have the parties go back to the AEC for findings on quantum, he concluded that in view of the AEC's continuing refusal to pay plaintiff over a period of five years since its original decision, future relief there would be inadequate and unavailable. Hence, he recommends that

plaintiffs' damages be fixed by this court under a Rule 131(c) proceeding. The points are ably made and the arguments are substantial, but we disagree.

The pervasive question running through this controversy is whether the Government has a right at all to seek judicial review based on Wunderlich Act standards where a tribunal of its own creation issues a contract disputes decision favorable to the contractor. Should this question be answered affirmatively, we must also decide whether the Government's method of obtaining judicial relief in this case, simply by denying payment was proper.

Before tackling these provocative questions, we think it appropriate to define clearly the perimeters of our analysis. The factual background indicates that the Comptroller General effectively stopped payment of the claims. The Government, however, as represented by the Justice Department, which alone speaks for it in court, says that plaintiff would have been victorious by default in this court at the outset had Justice not decided to defend this suit. Specifically, it argues that this decision to defend was not prompted by any sort of requirement to give mandatory defense to opinions of the Comptroller General, but rather it was the uninfluenced product of the Justice Department's own thorough and independent review of the case. The Department considered the AEC's decision erroneous on matters of law and unsupported by substantial evidence in this case before us. Counsel for the Government therefore urges us to ignore the Comptroller's intervention as being the occasion but not the cause of the litigation and in no way itself an administrative decision having effect here or coming under our review.

We agree that the Comptroller's powers of decision and settlement, though great, may be assumed to lapse and fail at the Court House door. Therefore, it is not necessary for us to determine what decisions he might make or what finality they might have in cases not brought before us.

When a Wunderlich Act case is pending here, the only question is how much finality attaches to the findings and holdings of the Board set up to execute the powers of the head of the agency in the premises. Really it makes no difference now whether the failure of defendant to pay out as the Board determined results, as here, from the Comptroller General's implied threat to charge the certifying officer's account, or from a change of heart in the agency itself, as was the case in *C. J. Langenfelter & Son, Inc. v. United States*, 169 Ct. Cl. 465, 341 F. 2d 600 (1965). We hold that in either event, a refusal by defendant to pay a Board award is not a breach of the disputes clause if the involved award is not supported by substantial evidence or otherwise is not entitled to finality under the Wunderlich Act. The reasons for this view follow.

The focus of our inquiry is the Wunderlich Act; the exact wording of the contract disputes clause in question has no bearing, at least as applied to the case before us. As we said in an earlier case, "it is the Wunderlich Act which is determinative. The minimal bounds of judicial review must be drawn from the terms, history, and policy of that Act, not from policies speculatively drawn from the contract clauses which are themselves governed by the statute." *C. J. Langenfelter & Son, Inc. v. United States*, 169 Ct. Cl. at 477 n. 7, 341 F. 2d at 607 n. 7 (1965).

Enacted in 1954 and unmodified thereafter, the Wunderlich Act reads as follows:

**§ 321. LIMITATION ON PLEADING CONTRACT-PROVISIONS
RELATING TO FINALITY; STANDARDS OF REVIEW**

No provision of *any* contract entered into by the United States, relating to the finality or conclusiveness of *any* decision of the head of *any* department or agency, or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in *any* suit now filed or to be filed as limiting judicial review of *any* such decision

to cases where fraud by such official or his said representative or board is alleged: *Provided, however, That any* such decision shall be final and conclusive unless the same is fraudulent (sic) or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. (Emphasis supplied for word any).

§ 322. CONTRACT-PROVISIONS MAKING DECISIONS FINAL ON QUESTIONS OF LAW

No Government contract shall contain a provision making final on a question of law the decision of *any* administrative official, representative, or board. (Emphasis supplied).

Strictly read the Act favors neither Government nor contractor: judicial review to whatever extent prescribed, seems extended equally and under like conditions to both contracting parties. The legislative history, albeit not explicitly, in general supports this construction. Both the House of Representatives and the Senate held full hearings on various bills introduced to undo the Supreme Court's decisions in *United States v. Wynderlich*, 342 U.S. 98 (1951); and *United States v. Moorman*, 338 U.S. 457 (1950), making administrative disputes clause decisions final in the absence of fraud. (*Hearings on H.R. 1839, S. 24, H.R. 3634 and H.R. 6946. Before Subcomm. No. 1 of the House Comm. on the Judiciary, 82d Cong. 1st and 2d Sess., ser. 12 (1953-54)*), (hereinafter referred to as the House Hearings); *Hearings on S. 2487 Before the Senate Subcomm. of the Comm. on the Judiciary, 82d Cong., 2d Sess. (1952)*, (hereinafter referred to as the Senate Hearings). Spokesmen representing public and private interests presented contrasting views on the proposed legislation and the compass of its judicial review privileges. A sampling of their statements follows:

And of course, the [Supreme Court's *Wynderlich*] rule works *both* ways. A deciding administrative offi-

cial can make decisions adverse to the Government as well as to contractors, in which event an improper decision results in a burden, an improper burden, to the taxpayers * * *. The experience of the General Accounting Office has been that this is not an infrequent situation. * * *

* * *. The enactment of such a [curative] bill would preclude administrative officers from making final decisions in contract matters on questions of law, but would leave such final decisions for determination by the General Accounting Office and the courts.

On the other hand, it would permit them to make determinations on questions of fact which would have final effect if the decisions were not found by the General Accounting Office or the courts to be fraudulent, arbitrary, capricious, et cetera. Such a law would not only protect a contractor from fraudulent, arbitrary or capricious action by giving him, in addition to resort to the courts, a further administrative remedy before the General Accounting Office, a time saving and less expensive proceeding, but it also would provide a protection, through the General Accounting Office, against decisions adverse to the interests of the United States. Certainly the rights of contractors and the Government to review or appeal should be *coextensive*.

Now, we feel, * * *, that this is a two-sided proposition. The interests of the contractors are clearly and undoubtedly involved. But likewise involved are the interests of the Government. I mean the *Government as a whole*, not just the Government as represented by one department or by one contracting officer.

Senate hearings, *supra*, at 9, 11, and 12, remarks of Frank L. Yates, Assistant Comptroller General of the United States. (Emphasis supplied).

The position of the . . . [Associated General Contractors of America] is: We believe that *any* decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of *both* the contracting parties, and supported by the evidence upon which such decision was based. (Senate Hearings, *supra*, at 29, remarks of John C. Hayes, counsel for the Associated General Contractors of America). (Emphasis supplied).

The essence of the legislative proposal now before this committee is that the contractor is to be given three reviews, that is one before a contracting officer, a second before the head of the department concerned, and a third before the Court of Claims, while the Government has but one [before the contracting officer]. Senate Hearings, *supra*, at 16, remarks of Bonnell Phillips, attorney Department of Justice. (This criticism was directed at the original proposal, not the draft subsequently enacted into law).

Specific citations to further testimony on this subject are as follows: Senate Hearings at 83-84, remarks of Gardner Johnson, attorney at law; House Hearings at 4, remarks of Elwyn L. Simmons, President, J. L. Simmons Co., Contractors; *Id.* at 12, statement of Harry D. Ruddiman representing certain contractors; *Id.* at 19-20, remarks and letter of Alan Johnstone, attorney; *Id.* at 32-34, statement of the Honorable Edwin E. Willis (Representative, Louisiana) sponsor of H.R. 6946; *Id.* at 38-39, remarks of E. L. Fisher,

General Counsel, General Accounting Office; *Id.* at 48, remarks of U. Bonnell Phillips, Assistant to the Assistant Attorney General, Civil Division, Department of Justice; *Id.* at 59, remarks of J. H. Macomber, Jr., Associate General Counsel, General Services Administration; *Id.* at 109-11, remarks of Franklin M. Schultz; *Id.* at 140, letter of Lindsay C. Warren, Comptroller General of the United States; *Id.* at 138-139, letter of William P. Rogers, Deputy Attorney General of the United States; 99th Cong. Rec. 4573 (1953), remarks of Senator McCarran.

Plaintiff concedes that the recorded question and answer dialogue of the House and Senate Hearings "show Congressional awareness and intent that an administrative resolution of a contract dispute be amenable to review by both contracting parties", but it denies nevertheless "that the reviewing authority to be vested in the Government was to be anything other than the review function that had, in previous times, been exercised by the General Accounting Office." Simply, plaintiffs' "basic position" is that "under the Wunderlich Act, Congress contemplated that the GAO *alone* would be vested with the *limited* authority [over cases of fraud and gross error] to speak for the Government in respect to matters involving contract payment decisions." (Emphasis supplied). Contrarily, the Government argues that the qualified brand of judicial review afforded by the Wunderlich Act was intended to be equally available to both Government and contractor.

Although it has been accurately observed that the Act's legislative history "has something for everyone" (Kipps, *The Right of the Government to Have Judicial Review of a Board of Contract Appeals Decision Made Under the Disputes Clause*, 2 Pub. Contract L.J. 286, 295 (1969)), we are convinced that Congress through the Hearings received a presentation emphasizing more the need for courts of competent jurisdiction to be open to both parties. The committee reports resulting from these Hearings reflect

adoption of this position. The Senate Report accompanying S. 24 (S. Rep. No. 32, 83d Cong., 1st Sess. (1953)), which reflects the Wunderlich Act as passed, subject to modification to clarify the Comptroller General's status and other matters, makes the following observation:

It must also be borne in mind that to the same extent this decision [Wunderlich] would operate to the disadvantage of the *aggrieved contractor*, it would also operate to the disadvantage of the Government in those cases, as sometimes happens, when the contracting officer makes a decision detrimental to the *Government* interest in the claim.

S. 24 will have the effect of permitting review in [the General Accounting Office] or a court with respect to *any* decision of a contracting officer or head of an agency which is found to be fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by [reliable, probative,] and substantial evidence. In other words, in those instances where a contracting officer has made a mistaken decision, either wittingly or unwittingly, it will not be necessary for the *aggrieved party* to, in effect, charge him with being a fraud or a cheat in order to effect collection of what is rightfully due. (Emphasis supplied). [Bracketed language denotes corresponding language in S. 24 later deleted by preenactment amendment.]

Identical language to that quoted above can be found in Senate Report No. 1670, *supra*. Although the House Report (H.R. Rep. No. 1380, 83d Cong., 2nd Sess. (1954)) did not include similar language, it did make this statement:

After extensive hearings it has been concluded that it is neither to the interests of the *Government* nor to the interests of any of the industry groups that

are engaged in the performance of Government contracts to repose in Government officials such unbridled power of finally determining either disputed questions of law or * * * fact arising under Government contracts, nor is the situation presently created by the Wunderlich decision consonant with the tradition that *everyone* should have his day in court and that contracts should be mutually enforceable. * * * (Emphasis supplied).

Considering the plain language of the Act and the basic premises of equity surrounding its passage, we reaffirm our reasoning in *C. J. Langenfelder, supra*, and *Acme Process Co. v. United States*, 171 Ct. Cl. 251, 258-59, 347 F. 2d 538, 543-44 (1965), and hold that the Government has the right to the same extent as the contractor to seek judicial review of an unfavorable administrative decision on a contract claim.

Our commissioner ruled and plaintiff now argues that the AEC's "repudiation" of its own decision was a breach of the disputes clause thereby entitling the plaintiff to *automatic* summary judgment on appeal. We have already rejected similar positions in *C. J. Langenfelder* and *Acme Process*, and for the reasons stated in those cases, plaintiffs' assertion must likewise fail. We recognize that these two cases tacitly condoned the Government's withholding technique—exercised to the fullest here—as a way of forcing suit in this court and obtaining "at the very least" judicial review on questions of law. The instant case, however, not only involves questions of law, but also questions of fact and those elusive abominations known as mixed questions of law and fact.

We do not perceive this to be a distinction substantial enough to cause different results. Neither the Act nor its history will sustain foreclosing the Government from judicial review on this basis. Divided into two sections, the

Act precludes the attachment of finality to any administrative decision rendered on a question of law or issued as a result of fraud, caprice or arbitrariness or so grossly erroneous as to imply bad faith, or not supported by substantial evidence. The same equity which permits us to relieve the parties from legally erroneous decisions also dictates our intervention where factual determinations are fraught with any of the above deficiencies.

The Supreme Court's *United States v. Utah Constr. Co.*, 384 U.S. 394 (1966), anticipates our conclusion with approval. There the contractor under the disputes procedure brought two claims against the contracting agency, the Atomic Energy Commission. The "Pier Drilling" claim asked for an equitable adjustment of the contract price and a time extension under the contract's changed conditions clause. The second claim—denominated as the "Shield Window" claim—sought additional compensation and time for inadequate specifications and drawings supplied by the Government. Both claims alleged that the additional compensation was needed to balance losses incurred by the contractor consequent to Government-caused delays. The AEC's Contract Appeals Board made findings generally unfavorable to the contractor thus prompting suit in this court. We found the contractor's claims for delay damages to be breach of contract claims and as such ineligible for administrative consideration under the disputes procedure. We held, with one dissent, that the Board's findings on these claims were not final and that it was appropriate for us to consider the factual circumstances *de novo*. The Supreme Court rejected this reasoning. The Court noticed that the Board's findings as to the causes of the contractor's delays were common to both the disputes claims for time extensions and the breach claims for damages. It held therefore that where a Board makes findings within the scope of its disputes authority, the presumed finality of these findings statutorily prescribed by the Wunderlich Act does not evaporate merely by chang-

ing the labels on the claims. Crucial to our case, however, is the concluding pronouncement made by the Court in *Utah* at 422:

In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the *factual* disputes resolved were clearly relevant to issues properly before it, and *both* parties had a full and fair opportunity to argue their version of the facts *and* an opportunity to seek court review of any adverse findings. * * * (Emphasis supplied).

Hence the Court recognized the Government's right to judicial review of administrative factual determinations not meeting Wunderlich standards.

The trial commissioner's theory presupposes an identity between the Boards which adjudicate "Disputes Clause" cases and the directing heads of the agencies which make the contracts. When the Boards have spoken, the agencies have spoken, he thinks, and if they sustain the contractor, there is no dispute and nothing for the judicial power to operate on. It is true the differentiation is imperfect in the AEC procedure under review here, where the AEC itself is the final arbiter. But even so, the hearing examiner had no management functions. Under the Armed Services and GSA contracts, which generate the largest number of contract disputes, the Boards operate independently of the procurement authorities. The Armed Services Procurement Regulation establishes the Armed Services Board of Contract Appeals and authorizes it to decide appeals under the Disputes Clause of the contract, "as fully and finally as might each Secretary." 32 CFR § 30.1 (1962). The Federal Procurement Regulations contain similar provisions for the General Services Administration Board of Contract Appeals. 41 CFR § 5-60.101 (1963). The Secretary of Defense and the Administrator of GSA reserve to themselves no power of review or ratification of Board decisions. If one of them tried to tell a Board what to

do in a pending case, he would commit a reprehensible *ex parte* approach. *Camero v. United States*, 179 Ct. Cl. 520, 375 F.2d 777 (1967).

We think the Wunderlich Act and the Supreme Court decisions interpreting it, in attributing finality to the extent they do to decisions of these Boards, necessarily imply an expectation that the Boards, while in the nature of things not as independent as Article III courts, will enjoy a degree of independence approaching and comparable to that of the various independent quasi-judicial and regulatory boards and commissions, which, too, can make binding fact findings. *E.g.* National Labor Relations Board, 29 U.S.C. § 153 (1947); Securities Exchange Commission, 15 U.S.C. § 78d (1934); Federal Communications Commission, 47 U.S.C. § 151 (1934); Civil Aeronautics Board, 49 U.S.C. § 1321, (1958); Interstate Commerce Commission, 49 U.S.C. § 11 (1935). Having achieved this, it would be inconsistent and unfair for the law to turn around and pretend that the Board and the Secretary were the same. The Supreme Court characterized a disputes clause as an agreement "for the settlement of disputes in an arbitral manner", in the *Wunderlich* case, *supra*, 342 U.S. at 100. Appeals Boards of course, like the rest of us, sometimes err, but we see scant reason to believe they think of themselves as closer to one party than the other. To do so would demean the high standards they are sworn to as members of the bar. The Armed Services Board must consist of qualified attorneys admitted to the bar. 32 CFR § 30.1. The GSA Board includes at least three lawyers of whom each panel must include one or more. 41 CFR § 5-60.102. These requirements imply not only standards of education and training but also standards of ethics. From lawyer members, we believe, the public has a right to expect conformity to Canon 13 of the Canons of Judicial Ethics when they are acting in what the Supreme Court *quot supra*, calls a "judicial capacity." Canons 17, 24 and 29 also have special application to lawyer members of Contract Appeals Boards.

We think, in the existing circumstances, a Board power to extinguish a case or controversy merely by agreeing with the contractor is inconsistent with true independence. If, e.g., the Secretary of Defense has established a Board that binds him as fully as he could bind himself, even as to legal conclusions and even in case of an arbitrary or capricious Board decision, he has created a Frankenstein monster. The temptation either to appoint persons to the Board who would be subservient to management wishes, or to make improper *ex parte* approaches, would be near to impossible to resist. Within the four walls of an executive establishment, the real independence of a Board would be suspect, the facts as to this would be difficult to come by, and contractors could never be sure they were getting from disputes clause procedures what they had contracted for. On the other hand, if the Secretary has the right to seek review within Wunderlich Act limitations, there is a safety valve and Boards can call cases as they see them without so much pressure building up. It would seem therefore, that even an egomaniac Board member would not desire the powers it is asserted on his behalf he possesses. Most of us have enjoyed the blessed relief of saying: "If you don't like my decision, the courts are open!"

In the administration of revenue laws, the differentiation between administration and adjudication is often not spelled out. The result is the rule of selecting among possible interpretations of law, the one that appears likely to raise the most tax. This rule has a name, the "Protect the Revenue" principle, under which it is heresy to abandon an arguable non-frivolous line of legal reasoning on the mere ground that another line, generating less revenue, appears to be right. Abandonment of the most favorable line to the Government would normally not be reviewed by a court, and would be final, while insistence on it produces judicial review, and this is the controlling reason why the administrator-adjudicator is apt to prefer the latter. From these observed facts it seems clear that decisions of a truly

impartial and independent tribunal should always be equally reviewable, for whomsoever it decides. Breach of this principle is a prime cause of slanted decisions.

It is true, as we have already noted, that the AEC had not delegated its disputes clause powers to an independent Board. In this, however, the situation was somewhat unusual. We think we are justified in analyzing the position of the congress and the Supreme Court in light of their knowledge that delegation to an independent Board was then common and doubtless would remain so. Since the Wunderlich Act, the head of an agency would appear to be acting in a judicial capacity when he reserves to himself the adjudication of a claim under disputes clause procedure. He has for the nonce set his managerial responsibilities aside and put on another hat. Otherwise he would not be entitled to claim Wunderlich Act finality for his decision against a contractor's attack. The employment, as in this case, of a hearing examiner facilitates this differentiation of roles, and makes it more than a sham. Despite the emphasis of one of our dissenters on the absence of an independent Board in this case to execute the powers here involved, no reason is offered why legal consequences should flow from the distinction, and it would appear there are none. If we held that the AEC's action obliterated the dispute, we would have to hold that the decision of a Board it created would do the same.

We are assured on behalf of defendant that the GAO has in the past but sparingly tripped up the implementation of a Board decision favorable to a contractor, by means of threatening to charge a certifying officer's account, or otherwise. We are asked to infer it will exercise life self-restraint in the future. If so, the effect of our decision will not be to encumber further the already deplorably slow and rocky road to the final adjudication of Government contract disputes under the Wunderlich Act. If not, this would be for the further attention of Congress rather than warrant-

ing us in frustrating its evident purpose as to the full mutual availability of judicial review under the statutory standards. As long as procedures remain as they are, there is need for special diligence on the part of all concerned to keep cases moving along and to avoid multiplication of needless technical maneuvers.

In view of the foregoing, we remand the case to the commissioner for his consideration and report on the various claims under Wunderlich Act standards.

SKELTON, *Judge*, dissenting:

This court should not consider nor act on the alleged "appeal" filed by the Attorney General in this case for the reasons set forth below.

There is no Controversy Between the Plaintiff and the Atomic Energy Commission on the Facts or the Law in This Case

It is elementary that a court will not consider a case unless there is a controversy between the parties on the facts or on the law, or both. No such controversy exists here. The contract was made between the plaintiff and the Atomic Energy Commission (AEC). They included the standard "disputes" clause in the agreement which established the procedure for presenting, considering, appealing, and settling claims and disputes. During the performance of the contract, disputes did occur and plaintiff presented the claims involved here to the contracting officer, who rejected them. The plaintiff duly appealed to the AEC, who referred the claims to an examiner. The examiner heard the evidence and handed down his decision. The contracting officer appealed from the examiner's decision to the AEC, who modified the examiner's decision and eventually issued its own decision and opinion. All of this was done in strict accordance with the disputes clause and the agreement of the parties. The plaintiff has accepted the decision of the AEC and is agreeable to the disposition of

its claims in the manner set forth in such decision. Under these circumstances, one may logically ask the question, where is the controversy? Clearly there is none.

The only complaint the plaintiff has is the fact that it has not been paid and its claims have not been disposed of in accordance with the decision of the AEC to which it has agreed. In effect, the parties to the contract have settled their differences to the extent they are covered by the AEC decision.¹ In a sense, the situation of the parties here could be likened to that of litigants whose disagreements have become a stated account. Of course, this court has jurisdiction to entertain plaintiff's claim because it has not been paid as provided in the AEC decision.

On the other hand, the AEC has no claim, and, therefore, no right of appeal in this case. Actually, it has not asserted any claim nor any right of appeal here. As far as the record shows, it handed down a decision and was willing to carry it out and would have done so had it not been for the unjustified and completely unauthorized interference by the General Accounting Office (GAO), which will be discussed in more detail below, and the attempt by the Department of Justice to substitute its opinion for the decision of the AEC. In fact, were it not for the action of the GAO and the Department of Justice, the AEC would be willing to implement its decision at the present time, because there is nothing in the record that indicates it would not do so. As shown below, the Attorney General agrees that the AEC's decision has not been changed and the AEC would be willing to enforce it.

The AEC is the government as far as plaintiff's contract is concerned. It is the only party to the contract besides the plaintiff. The GAO did not sign the agreement and is not

¹ The AEC decision, for the most part, determined the liability of the government to the plaintiff leaving the amount plaintiff is to receive to be determined later by the contracting officer, subject to plaintiff's right to appeal as provided in the disputes clause.

a party to this suit. The same is true with respect to the Department of Justice, who appears here only as the attorney for the AEC.² The AEC has no claim and asserts none.

The AEC Has not Reversed, Modified, Cancelled, Set Aside, or Changed Its Decision in Any Way.

Another compelling reason why we should not consider the appeal filed by the Department of Justice is the fact that the AEC never at any time reversed, modified, cancelled, set aside, or changed its final decision between the time it was issued on May 13, 1964, and the date this suit was filed on April 11, 1967, or thereafter.

It will be noted that the concluding paragraph of the final order of the AEC of May 13, 1964, provided:

The proceeding is remanded to the contracting officer with instructions to proceed to final settlement or decision in accordance with the decision of the hearing examiner dated June 26, 1963, as modified by our order of November 14, 1963, and by this decision.

United States Atomic Energy Commission

/s/ Glen T. Seborg
Chairman Glenn T. Seborg

/s/ John G. Palfrey
Commissioner John G. Palfrey

/s/ James T. Ramey
Commissioner James T. Ramey

/s/ Gerald F. Tape
Commissioner Gerald F. Tape

/s/ W. B. McCool
W. B. McCool, Secretary³.

² This will be discussed more fully below.

³ Before the United States Atomic Energy Commission, In the matter of S. & E. Contractors, Inc. Under Contract No. AT (30-3) 790 Docket Nos. CA-161 and CA-162, Decision of May 13, 1964, pp. 14-15. For the sake of brevity, the complete decisions are not reproduced here.

This decision has never been reversed or changed in any way. The only act of the AEC after this decision was handed down was the writing of a letter dated March 27, 1967, by B. E. Hollingsworth, General Manager of the AEC, to the attorneys for the plaintiff, which stated:

The Atomic Energy Commission's view is that S&E Contractors, Inc. has exhausted its administrative recourse to the Commission. The Commission will take no action, in connection with the claims, inconsistent with the views expressed by the Comptroller General in his opinion of December 5, 1966—B-153841.

Sincerely yours,

B. E. Hollingsworth
General Manager⁴

This letter, although signed by the AEC's general manager, is not the official action of the AEC, but only the manager's opinion as to the view of the AEC. But even if it could be said to be the action of the AEC, it does not in any way reverse or modify the final decision of the AEC of May 13, 1964. It informs the plaintiff that it has exhausted its administrative recourse to the Commission. This is but another way of telling the plaintiff that the decision of the AEC is final and there is nothing more that plaintiff needs to do with the AEC. When the AEC said in the above letter that it would take no action in connection with the claims inconsistent with the GAO's opinion, it was simply saying that as far as it was concerned its decision of May 13, 1964, was final and it did not intend to do anything further with respect to it or the claims involved. Actually, it has not done anything further, and its decision of May 13, 1964, still stands.

As a matter of fact, the Attorney General has agreed that the AEC has not repudiated its decision and will

⁴ Exhibit A, page 8, plaintiff's petition.

promptly proceed to implement it if this court so orders. This is shown in Defendant's Request for Review of the Commissioner's Recommended Opinion filed herein on November 21, 1969, where the following statement appears:

**** To our knowledge to date [November 21, 1969] the Commission. [AEC] has not repudiated the decisions involved in this matter and, in fact, plaintiff is relying on the purported finality of the decisions involved in this litigation. Should the Court rule adversely to our assertions on the merits of the finality issues, then the Commission will promptly proceed to implement the decisions. *** [Id. at n. 4] [Emphasis supplied.]*

This is an unqualified admission that the AEC decision has not been reversed or changed in any way, but is still in force. Under these circumstances, there is no claim of the AEC (the government) before the court in this case. A further admission by the Attorney General along this line is found on page 8 of Defendant's Reply to Plaintiff's Response to Defendant's Request for Review of the Commissioner's Recommended Opinion, where it is stated:

**** If we are not successful in establishing that the disputes decisions lack finality, obviously upon a final judicial ruling to that effect, they would be promptly implemented. [Emphasis supplied.]*

There is no Need to Reach the Question of Whether an Executive Agency can appeal from a Board's Adverse Decision, as There is no such Agency Appeal nor a Board's Decision In this Case

The decision of the majority that an executive agency can appeal to this court from a Board's adverse decision is wide of the mark, and must be considered as pure dicta, because there is no appeal by an agency from a Board's decision in this case.

The majority approaches the problem as if the AEC, an executive agency, was appealing from an adverse decision

of an independent or quasi-independent Board. That is not the situation at all. In fact, no Board of any kind is involved. At the time this case arose, the AEC did not have a Board to hear appeals under the disputes clause. When the plaintiff appealed from the decision of the contracting officer, he appealed directly to the AEC. Since the AEC did not have an appeals board, it referred the appeal to a hearing examiner, who heard the case and rendered a decision on June 26, 1963. The contracting officer appealed to the AEC from this decision and the AEC modified it somewhat in its decision of November 14, 1963. The contracting officer was still not satisfied and asked for a rehearing. The AEC granted the rehearing and again modified the decision by its final decision of May 13, 1964. So, in this case, we do not have a board decision at all, but on the other hand we have not only one decision but two decisions of the AEC itself, both of which were rendered after the examiner had handed down his decision. Under these facts, it is erroneous to hold that there is an appeal by the AEC, the executive agency involved, from an adverse Board decision.

It is true that the majority opinion recognizes that the decision in this case was made by the AEC itself and not by a Board. But after acknowledging this fact, it is put aside and is ignored as far as the ultimate decision is concerned. Many pages of the opinion are devoted to a discussion of the independence, honesty and quasi-judicial character of administrative Boards, and why the "government" should be allowed to appeal from their adverse decisions (without saying who is the government or who in the government can appeal (through the Attorney General as attorney and spokesman)). The following excerpts from the opinion clearly indicate that it is based on the erroneous premise that the appeal in this case is by an executive agency from an adverse decision of a Board:

• • • [T]he central question presented is whether the Wunderlich Act • • • affords the Government a right

to obtain judicial review * * * of decisions of *administrative tribunals* unfavorable to it * * *. [Emphasis supplied.]

The pervasive question running through this controversy is whether the Government has a right at all to seek judicial review based on Wunderlich Act standards where a *tribunal of its own creation* issues a contract disputes decision favorable to the contractor.⁵ [Emphasis supplied.]

When a Wunderlich Act case is pending here, the only question is how much finality attaches to the findings and holdings of *the Board set up to execute the powers of the head of the agency in the premises*. [Emphasis supplied.]

Really it makes no difference now whether the failure of defendant to pay out *as the Board determined* * * *. [Emphasis supplied.]

We hold that * * * a refusal by defendant to pay a *Board award* is not a breach of a disputes clause if * * *. [Emphasis supplied.]

The majority opinion then discusses Armed Services and GSA *Board* and their independence from review by the Secretary and Administrator, respectively (as if that were the situation here), saying:

Under the Armed Services and GSA contracts * * * the *Boards* operate independently of the procurement authorities. * * *. The Secretary of Defense and the administrator of GSA reserve to themselves no power of review or ratification of *Board decisions*. [Emphasis supplied.]

We think the Wunderlich Act and the Supreme Court decisions interpreting it, in attributing finality to the extent they do to decisions of these *Boards*, necessarily imply an expectation that the *Boards* * * * will enjoy

⁵ I interpret the words "administrative tribunals" and "a tribunal of its own creation" to mean and refer to Boards and not to the executive agency itself.

a degree of independence approaching and comparable to that of the various quasi-judicial boards and commissions in the Executive Branch, *which, too, can make binding fact findings, e.g., National Labor Relations Board [etc.]*. * * * *Having achieved this, it would be inconsistent and unfair for the law to turn around and pretend that the Board and the Secretary are the same.* [Emphasis supplied.]

We think, in the existing circumstances, a Board power to extinguish a case or controversy by agreeing with the contractor is inconsistent with true independence. If, *e.g., the Secretary of Defense has established a Board that binds him as fully as he could bind himself, even as to legal conclusions and even in case of an arbitrary or capricious Board decision, he has created a Frankenstein monster.* * * * *Within the four walls of an executive establishment, the real independence of a Board would be suspect* * * *. [Emphasis supplied.]

* * * *On the other hand, if the Secretary has the right to seek review within Wunderlich Act limitations, there is a safety valve and Boards can call cases as they see them without so much "pressure building up."* [Emphasis supplied.]

The real basis of the majority opinion is shown by the following statement:

From these observed facts it seems clear that decisions of a *truly impartial and independent tribunal* should always be equally reviewable, for whomsoever it decides. [Emphasis supplied.]

A reading of the above excerpts from the majority opinion makes it inescapably plain and clear that the opinion is based on the erroneous belief that in this case we

* No Secretary has sought review and there is no independent Board decision in our case.

have an appeal by an executive agency from an adverse decision of an independent tribunal or Board. These are just simply not the facts. It appears that the majority has attempted to decide a question that is not involved here.

The majority cites the cases of *C. J. Langenfelder & Son, Inc. v. United States*, 169 Ct. Cl. 465, 341 F. 2d 600 (1965) and *Acme Process Co. v. United States*, 171 Ct. Cl. 251, 347, F. 2d 538 (1965) in support of its decision. These cases are distinguishable on the facts and issues from the case before us. In the *Acme* case there was a Board decision, but there is none here. In *Langenfelder* the agency repudiated its decision and attempted to reopen the hearing in order to reverse it, which is not the case here.

Should it appear that those cases in any way conflict with the opinions herein expressed, to that extent I would overrule them.

The majority opinion is deficient in at least two vital respects, namely, (1) There is no appeal by the AEC (the concerned agency) from a Board decision nor from its own decision, and (2) There is no Board decision from which the AEC or any other agency could appeal.

The Attorney General has attempted to equate the decision of the AEC's hearing examiner to that of a Board. But this falls short of the mark. The agency's examiner and a Board are not the same. Their decisions are not the same. Furthermore, the AEC took the controversy out of the hands of its examiner and rendered two decisions itself thereafter. These are the decisions involved here.

The Action of the GAO Was Unauthorized and Beyond the Scope of Its Authority.

The GAO has an auditing function and is without authority to overturn the decision of a contracting officer, a Board or an executive agency, in contract cases involving the standard disputes clause, in the absence of fraud or over-

reaching. See *James Graham Mfg. Co. v. United States*, 91 F. Supp. 715 (N.D. Cal. S.D. 1950). Our able Trial Commissioner, Mastin G. White, found that there was no fraud or overreaching in this case. Therefore, when the GAO handed down a decision that plaintiff's claims were invalid and that the decision of the AEC favorable to the plaintiff on such claims was not supported by substantial evidence and was erroneous on matters of law, it purported to act as a reviewing court—a self-appointed court of claims—completely beyond its authority.

In addition to the foregoing, the action of the GAO on the claims involved in the case before us was completely unauthorized because such claims were never presented to it even for audit. The facts reveal that a certifying officer of the AEC asked the advice of the GAO with respect to the certification of a voucher in the sum of \$32,297.73 payable to the plaintiff under the contract. This voucher consisted of three items, namely \$22,280 withheld from plaintiff because it allegedly owed such amount to a supplier of aggregate, \$8,366.19 withheld because of the government's possible liability to another contractor, and \$1,651.54 withheld because of a possible liability by the plaintiff to another contractor for telephone services. Our trial commissioner found that these amounts and this voucher did not include any proposed payment to the plaintiff on any of the seven claims that are under consideration in this case, namely, the "access", "concrete", "steam", "weather", "acceleration" and "backfill" claims. The Attorney General disputes this finding and says that at least one of the items in the voucher was related to delay damages for time extensions in the performance of the contract. The findings of the Commissioner are presumed to be correct, but even if he was mistaken in this respect, the action of the GAO was still unauthorized. It proceeded to review these seven claims in their entirety, the quantum of most of which had not (and has not) been determined, even though the claims had not been submitted to it for audit, and then issued an

opinion regarding the invalidity of the AEC's entire decision, as aforesaid. It is clear that in taking this action, the GAO went out of its way to perform a review function which was not within its authority either by statute or by the terms of the contract.

The GAO now says by its amicus curiae brief filed herein that its action is not binding on the plaintiff and that its decision "did not, and could not, affect the ultimate substantive rights of the plaintiff" (Page 15), citing *Iran National Airlines Corp. v. United States*, 175 Ct. Cl. 504, 508, 360 F. 2d 640 (1966) and *St. Louis B. & M. Ry., v. United States*, 268 U.S. 169, 174 (1925). This is of small consolation to the plaintiff after it has been "run over by the GAO steamroller" and forced into insolvency and out of business. His position is somewhat like that of an injured pedestrian who is told by a truck driver that he thought his truck had the right of way when it ran over him, and, anyway, he may recover from his injuries and he should just go away and forget it.

The Department of Justice takes more or less the same position, saying that the action taken by the GAO is "irrelevant", is not in issue, and is not being relied on. It is obvious that the Attorney General would find it very difficult if not impossible to sustain the acts of the GAO as being within the scope of its authority and binding upon the plaintiff.

I would not belabor the GAO issue were it not for the fact that the majority opinion seems to give tacit approval to what the GAO did here by saying:

We are assured on behalf of defendant that the GAO has in the past but sparingly tripped up the implementation of a Board decision favorable to a contractor by means of threatening to charge a certifying officer's account, or otherwise. We are asked to infer it will exercise like self-restraint in the future.

I am afraid that the majority is expressing a forlorn hope and is indulging in wishful thinking. This hope and thinking could turn to chagrin and dismay if the GAO, under the authority of the majority decision in this case, makes a regular practice of overturning administrative decisions favorable to contractors as it did here. In that case, the Frankenstein mentioned by the majority in another part of its opinion will have been created by us. The result will be disastrous to contractors and very hurtful to the government as well. I do not think we should approve, even by implication, what the GAO did here, but should flatly repudiate it.

The AEC Is The Government In This Case, and The Attorney General Is Without Authority To Revise, Modify or Overturn Its Decision.

The Attorney General claims to be "the government" in this case. He says on page 6 of Defendant's Reply to Plaintiff's Response to Defendant's Request For Review of The Commissioner's Recommended Opinion:

* * * In this Court, the Government is, for all intents and purposes, the Department of Justice, 28 U.S.C. §§ 516, 519 (1966 Supp.).

In this statement, and otherwise, he implies that he and his Department have the power and authority to review a decision of another executive agency and to overrule it and substitute his own opinion for it on questions of fact and of law, of mixed fact and law, policy, discretion, expediency, exigency, propriety and executive agency judgment. I do not agree. Such reasoning would indeed make his department a super reviewing agency without whose approval no other executive agency or department could do anything with finality. He cites 28 U.S.C. §§ 516, 519 (1966 Supp.) and *Federal Trade Commission v. Guignon*, 390 F. 2d 323 (8th Cir. 1968) in support of this proposition. A reading of

these authorities does not support his theory. The two cited statutes merely provide that when the United States or an agency or officer thereof is involved in litigation, he shall be the attorney and counsel in a representative capacity to conduct the litigation. In other words, he is supposed to act as any attorney would act in representing his client. These statutes in no way authorize him to review and overrule what another executive agency has already decided on matters peculiarly within its jurisdiction and substitute his own opinion and decision therefor.

The Federal Trade-Commission case, *supra*, does not support the theory of the Attorney General. There the Federal Trade Commission sought to enforce subpoenas issued by it by using its own attorneys to make application in court for such enforcement. The Attorney General took the position that the Commission could not represent itself in court but must have the application for enforcement made by the Attorney General "*at the request of the Commission*". The court upheld the contention of the Attorney General. It is clear that the issue there was whether the Commission could use its own lawyers or must use the Attorney General to make the application. This was a matter of who was to appear in court as the attorney for the Commission—a question of representation—not one of substituting the Attorney General's opinion or decision for that of the Commission on facts, policy or discretion, or any other matter within the jurisdiction of the Commission. It is significant, too, that the court indicated that the Attorney General should be requested by the Commission to represent it in court. (In our case there is no showing that the AEC ever requested the Attorney General to try to overturn its decision in this court, nor to modify it in any way.)

This court held in *Campbell v. United States*, 19 Ct. Cl. 426, 429 (1884) that the authority of the Attorney General to conduct suits in the Court of Claims on behalf of the government "may fairly be held to include, at least, every

act in the conduct of such suits, which an attorney at law, in a suit between individuals, might lawfully do." In other words, his position and authority is that of an attorney representing his client. We need go no further than the opinion of the Attorney General himself to support this proposition. He said in 7 Op. Att'y Gen. 577 (1855):

The relation of the Attorney General to any one of the Executive Departments * * * is that of counsel to client, namely, to give advice as to the legal right, and instruct procedure, *if desired*, leaving all considerations of administrative exigency or expediency to the decision of the proper Department. [Emphasis supplied.] [*Id.* at 577].

The Attorney General himself has repeatedly ruled that he has no authority to review or overturn decisions of other executive agencies upon questions of fact, of mixed fact and law, policy, discretion, expediency or other matters peculiarly within the jurisdiction of such agencies. I quote only a few of these opinions as follows:

* * * It is not within the scope of my authority to reverse this decision of the [Civil Service] Commission or to require it to issue the certificate of reinstatement [of a discharged employee.]

No statute is found which authorizes the Attorney General to reverse or review this action of the Commission * * *. [20 Op. Att'y Gen. 270, 272 (1891).]

* * * The Attorney General has no control over the action of the head of the Department [Secretary of the Interior], nor could he with propriety express any judgment concerning the *disposition* of the matter * * * that being something wholly within the administrative sphere and direction of such head of Department. [17 Op. Att'y Gen. 332, 333 (1882).]

This substantially asks me to exercise appellate jurisdiction over a decision upon mixed questions of fact and

law. This I am not empowered to do. [Directed to the Secretary of the Interior.] [20 Op. Att'y Gen. 711, 713 (1894).]

* * * I am not authorized to express any views upon a matter of propriety lying within your [Secretary of the Treasury] own executive judgment and discretion * * * . [25 Op. Att'y Gen. 93, 96 (1903).]

Finally, it is not within my province to construe the reasons affecting his administrative judgment and discretion, which might impel the head of a Department to take any action one way or the other in a matter pending before him for decision * * * . I am neither empowered nor required to pass upon the propriety of the exercise by the Secretary of the Interior of his official discretion. [25 Op. Att'y Gen. 524, 529 (1905).]

It appears * * * that I am not called upon to give an opinion upon a question of law now pending and undetermined in the Veteran's Administration but am asked to give an opinion upon a question which you have already considered and decided. It has been held by my predecessors that this Department possesses no jurisdiction under the law to revise a conclusion already reached * * * . (20 Op. Att'y Gen. 440). [38 Op. Att'y Gen. 149, 150 (1934).]

Mr. Bates says (10 Opin., 267): 'I have no power to investigate or decide on facts * * * .'

* * * I am not at Liberty to submit * * * an official opinion * * * upon the questions that have been decided * * * . [20 Op. Att'y Gen. 440, 444, 445 (1892).]

Not only must the question arise in the administration of a department, but it must be still pending and undecided. A matter which has been considered and decided by a department is not a 'question' upon which the Attorney General renders an opinion. (20 Op. 440).

As Attorney General Butler (3 Op. 39) said, in declining to render an opinion upon a question which had been decided by the department making the request: 'I cannot undertake to give an official opinion on the question proposed to me, without assuming that this office possesses a revisory jurisdiction not conferred upon it by law.' [39 Op. Att'y Gen. 67, 68 (1937).]

The last word of the Attorney General on this subject was expressed in his opinion of January 16, 1969, in which he said:

I understand the concern of GAO that its *review of contract appeals board decisions* is necessary to enable the Government to obtain judicial review of an adverse board decision. See 46 Comp. Gen. 441, 458 (1966). In my opinion, however, GAO review is not the only means to accomplish this purpose. *The contracting agency, acting through the Department of Justice as the Government's counsel in claims litigation, is also able to obtain such review on its own initiative.* . . .

. . . *The contracting agencies* should call to this Department's attention, on a continuing basis, *appeals board decisions* against the Government which they feel warrant litigation in accordance with the Wunderlich Act. *Thereupon,* . . . this Department, *as the attorneys* for the Government, will make an independent appraisal as to whether the suit can properly be litigated under the Wunderlich Act. . . . [Emphasis supplied.] [42 Op. Att'y Gen. January 16 (1969) at 9, 10.]

The broad executive responsibility for contract administration encompasses the separate functions of adjudication and advocacy. The contracting agency acts through its Board of Contract Appeals as *impartial arbiter of disputes*. Other organs of the agency represent the interests of the Government before the Board

in the role of advocate. The advocacy aspect of the over-all agency responsibility extends to determining *whether the agency* should seek review of an adverse board decision. [Emphasis supplied.] [42 Op. Att'y Gen. January 16 (1969) at n. 18.]

*** GAO audit can check on agency performance, but *only the contracting and legal officials of the agency have the intimate familiarity with these cases necessary for timely determination of those board decisions* in which judicial review to protect the interests of the Government is warranted. [Emphasis supplied.] [42 Op. Att'y Gen. January 16 (1969) at 11.]

Five principles stand out in the foregoing opinion. These are: (1) There must be a Board decision; (2) The Board must be an autonomous and "impartial arbiter of disputes;" (3) the Board's decision must be adverse to the interests of the government; (4) the contracting agency "on its own initiative" must seek judicial review of the Board decision; and (5) the Department of Justice acts as the attorney for the contracting agency. None of these requirements have been met in this case. Certainly, the opinion does not purport to approve an independent action by the Department of Justice on its own motion to judicially overturn the decision of an agency itself, which is the case here. Nor does it approve the proposition that an agency can appeal from its own decision. The opinion speaks only of an agency appeal from the decision of a *Board* that has acted as an "impartial arbiter" of a dispute.

In citing the 1969 opinion of the Attorney General above, I do not mean to imply that I agree with the statement therein contained that a contracting agency can obtain judicial review of an adverse Board decision. That question has not been expressly decided by this or any other court. It is not involved here. We should decide that problem when it is presented to us in a proper case.

The long-continued practice and custom of an executive agency in administering and performing its functions and duties and in interpreting applicable statutes, is entitled to great weight in determining its powers and authority. See *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-3 (1915); *Udall v. Tallman*, 380 U.S. 1, 17 (1965); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); *Power Reactor Development Co. v. Electricians*, 367 U.S. 396, 408 (1961); *Crawford v. United States*, 179 Ct. Cl. 128, 142, 376 F. 2d 266 (1967), *cert. denied*, 389 U.S. 1041 (1968). This rule is applicable here to determine the authority, or lack of it, of the Department of Justice.

It is clear from these statements of the Attorney General himself that he does not have any review or revisory power over decisions made by other agencies on matters peculiarly within their jurisdictions. He cannot substitute his own opinion for the decision of another agency, especially on questions of fact, mixed fact and law, policy, expediency, propriety, discretion, exigency or executive judgment. The above cited statutes did not enlarge his powers and authority in this regard.

The majority stresses the point that the Department's efforts here are "the uninfluenced product of the Justice Department's own thorough and independent review of the case." [Emphasis supplied.] It says further that "the Department considered the AEC's decision erroneous on matters of law and unsupported by substantial evidence * * *." I find no authority vested in the Department of Justice to review the AEC decision in any manner different from a review by any other lawyer of his client's case to familiarize himself with the issues involved in preparation for a court trial. Although not cited by the Attorney General, and apparently not relied on by him, a word should be said about Executive Order No. 6166 of June 10, 1933, issued by the President as authorized by Congress pertaining to the reorganization of executive agencies, in which

broad powers were given to the Department of Justice to handle cases in court for governmental agencies.⁷ Section 5 of the order provides in effect that such Department shall represent all government agencies and officers in all courts of the United States. It further provides that the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense in any case referred to it to handle in court, "*now exercised by any agency or officer*, is transferred to the Department of Justice." I do not think this provision gave the Department the authority to review, revise nullify, or reverse the administrative decision of another executive agency such as that before us, nor to substitute its opinion therefor. Actually, it did not give the Department any more authority in this regard than it already had. It will be noted that it was only given the function of decision *now exercised by any agency or officer*. At the time of the Order (1933) no agency had ever exercised any right of appeal to a court from an adverse decision of an administrative Board or from its own decision. As applied to our case, assuming the application of the Order as of the present time I have already shown that the question of whether an agency can appeal from an adverse decision of a Board is not before us and should not be decided. As to whether or not an agency can appeal from its own decision that is adverse to the government, my view is that it cannot do so. To allow such an appeal would be to sanction an absurd and ridiculous proceeding. In the first place, there is no necessity for it. If the agency thinks the government should win, it has the complete decision making power at the agency level. Such an appeal would be as ludicrous as an appeal by this court to the Supreme Court asking that one of our decisions be reversed. I cannot

⁷ Executive Order No. 6166 is reproduced in the footnote of Title 5, U.S.C.A., § 901 and also in Title 5, U.S.C. following omitted § 132, pp. 157-161 (1964 ed.).

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imagine an executive agency of the United States putting itself in such a foolish position. Since the agency is without power to engage in such an appeal, the Department of Justice is likewise without authority to do so by the very terms of the Executive Order.

Furthermore, the Department of Justice is given no decision making authority by the Order in a case until it is referred to the Department. Obviously such referral will not be made until the case is already filed in Court. Consequently, the words "or to appeal" refer to an appeal from the court decision and not to the administrative decision of the agency nor to a decision of a Board at the agency level. In short, the Order simply made the Attorney General the attorney for all agencies and officers of the government in cases in court and gave him the same powers to handle court cases that other attorneys have in similar circumstances in representing their clients. The Order did not empower the Attorney General to revise, modify or overturn an agency decision as he is attempting to do here. This is further shown by another paragraph of Section 5 of the Order as follows:

Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

The procedure being followed by the Attorney General here not only affects the function of the agency at the agency level, but actually nullifies it. If the Attorney General is to have the last word in contract appeals cases and is to have a veto power over agency and Board decisions, we might as well do away with decisions of agencies and Boards altogether, and send all such appeals directly to the Attorney General for hearings and decisions, after appropriate contract changes.

I do not think Congress ever intended to confer upon the Attorney General the power he is asserting here when it passed the Wunderlich Act. His action, with the approval of the majority opinion, has tied the whole administrative process in contract cases into a very tight knot of red tape and delay, and it may take an Act of Congress to untie it, since this court has not seen fit to do so.

A Day in Court for the Parties

The Attorney General, in effect, urges that the parties here are entitled to their "day in court" on the finality issue and on the merits. At first blush, this is appealing to the American sense of justice and fair play. However, when it is applied to the facts and procedures in this case, it loses its appeal. The plaintiff does not want a hearing in court. All he wants is the enforcement of the decision and to be relieved of inter-departmental squabbling over powers and duties. The AEC, the only other party to the suit, has had the questions involved in the case heard *four* times already by those authorized by the contract to hear them, namely, the contracting officer, the examiner and twice by the AEC itself, all of whom represented the government. The AEC has not asked for a court hearing on whether or not its decision is final nor on the merits, and, if it could speak out, it would no doubt oppose it. That only leaves the Attorney General, who is not a party and who appears in the case as an attorney. He wants a hearing in court to enable him to assert a theory contrary to the decision of his client, the AEC. His argument is unpersuasive.

The effect of the majority opinion is to allow the Attorney General *sua sponte* to appeal from the decision of another executive agency adverse to the government for the purpose of overturning it, and, by dicta, authorizes him to similarly appeal from an adverse Board decision for the same purpose. Such a procedure imposes an additional layer of

bureaucratic red tape that contractors must overcome before they receive final decisions along the administrative trail on their claims under the disputes clause in government contracts. It easily adds from one to three years, and perhaps more, to the already extended period of time for processing a contractor's claim. Under such a system, how can a knowledgeable contractor afford to do business with the government?

Quantum and Breach of Contract

The trial commissioner held that the failure of the AEC to pay the plaintiff and carry out its decision for a period of over five years after it was rendered was a breach of contract. He also held that the administrative procedure was inadequate and unavailable and under the authority of *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966), we should proceed to hold a trial on the quantum due plaintiff on his claims. Judge Collins also held in his dissent that there was a breach of contract by the AEC, citing *United States v. Marietta Mfg. Co.*, 268 F. Supp. 176 (S.D. W. Va. 1967). While a breach of contract is strongly indicated, I feel that the AEC cannot be blamed for failure to pay the plaintiff because of the action of the GAO and especially because of its threat to charge any payment made to the certifying officer of the AEC. Therefore, I would not hold that the AEC breached the contract. Also, I feel that, although probably justified, the better policy would be not to hold the trial on quantum here but to remand the case to the AEC and its contracting officer for that purpose.

CONCLUSION

I would deny the motion of the Attorney General for summary judgment, and grant plaintiff's motion for summary judgment, and remand the case to the AEC and its contracting officer for the purpose of enforcing and carrying out the final decision of the AEC.

COWEN, *Chief Judge*, concurs in the foregoing dissenting opinion of Judge Skelton.

COLLINS, *Judge*, dissenting:

I concur in Judge Skelton's opinion except that I would hold that in failing to pay its own award, the AEC breached its contract with S & E. Because of the broad impact of the court's opinion, however, I feel compelled to address myself to the issues as the court has framed them.

The court's decision in this case will, in one fell swoop, render the already troubled business of Government contracting hopelessly chaotic. I am convinced that today's decision is wholly undesirable and supportable only by a strained interpretation of legislative history.

The essence of the court's opinion is that the Wunderlich Act, 41 U.S.C. §§ 321-22 (1964), affords the Government the right to judicial review of decisions of its own agencies, rendered pursuant to the standard "disputes" clause in Government contracts, adverse to it. Support for this conclusion comes, according to the court, from the words of the act itself and from bits of legislative history which, in the court's words, "albeit not explicitly, in general supports * * * [the court's] construction." My own view of the act and its pre-enactment history leads me to the contrary conclusion.

Contrary to the court's opinion, I do not read the act as extending judicial review to both parties "equally and under like conditions." The clear and unambiguous language of the act reveals that, far from extending the right of judicial review to the Government, it merely serves to limit the contents and effect of the "disputes" clause, which has a history long antedating the act.

Furthermore, since a statute is merely the attempted verbalization of the legislative will, statutes must be read with one eye on the underlying legislative intent. In 1892,

the Supreme Court, speaking through Mr. Justice Brewer, commented as follows:

• • • It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. • • •

• • • "• • • The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed." • • •

Church of the Holy Trinity v. United States, 143 U.S. 457, 459-60 (1892), cited with approval in *Inter-City Truck Lines, Ltd. v. United States*, 187 Ct. Cl. 290, 295, 408 F. 2d 686, 688-89 (1969), *Select Tire Salvage Co. v. United States*, 181 Ct. Cl. 695, 703, 386 F. 2d 1008, 1012 (1967). More recently, the Supreme Court has said that:

• • • When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, *however clear the words may appear on "superficial examination."* • • • *A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, "excepting as a different purpose is plainly shown."* [Footnotes omitted, emphasis supplied.]

United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940).

For courts to interpret statutes in such a way as to extend, limit, modify, or alter in any way the manifest intent of the legislature amounts, in my view, to a clear usurpation of the legislative function. As I shall attempt to demonstrate, the act in question has but a single and limited purpose which does not at all support the court's conclusion in this case.

The Wunderlich Act (which, more appropriately, might be called the Anti-Wunderlich Act) was Congress' direct response to the Supreme Court's decision in *United States v. Wunderlich*, 342 U.S. 98 (1951). In that case, reversing this court, the Supreme Court held that a decision of an agency head (or the contract appeals board to which he has delegated authority) under the "disputes" clause¹ could not be overturned on judicial review "unless it was founded on fraud, alleged and proved." 342 U.S. at 100. The devastating effect of the *Wunderlich* decision was well described by Justice Douglas when he said, in dissent, that "[i]t makes a tyrant out of every contracting officer." 342 U.S. at 101.

The evil perceived by Justice Douglas and the other dissenters did not escape congressional attention, and several bills were introduced, in both houses, to remedy the evil. Each house held its own hearings on the matter. The

¹ The usual pre-Wunderlich Act "disputes" clause was as follows:

"ARTICLE 15. *Disputes*.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

Senate hearings, from which testimony is quoted by the court, were held in 1952. Witnesses at these hearings, representing both Government and industry, were understandably alarmed by the degree of finality which the Supreme Court's decision had accorded administrative decisions under the "disputes" clause.

The flavor of the witnesses' testimony regarding appeal from such decisions is, in many cases, ambiguous and, in no event, can be viewed as an endorsement of the position that the Government should be able to disavow and seek judicial review of adverse board decisions. On the contrary, if there is a discernible flavor to the Senate hearings, it is that only the contractor should have the benefit of judicial review.

For example, the testimony of Frank L. Yates, Assistant Comptroller General of the United States, quoted by the court, is to the effect that "the rights of contractors and the Government to review or appeal should be coextensive." *Hearings on S. 2487 Before the Senate Subcomm. of the Comm. on the Judiciary*, 82d Cong., 2d Sess. 11 (1952). At the same time, however, Mr. Yates testified as follows:

• • • Such a law [a modified version of S. 2487 offered by the GAO] not only would protect a contractor from fraudulent, arbitrary or capricious action by giving him, *in addition to resort to the courts*, a further administrative remedy before the General Accounting Office, a time saving and less expensive proceeding, but it would also provide a protection, through the General Accounting Office, against decisions adverse to the interests of the United States. • • • [Emphasis supplied.]

Id. The witness' careful reference to the right which each party would have to review by the GAO and his obvious failure to refer to a concomitant right on the part of the Government to have "resort to the courts" can only indi-

cate that, in urging "coextensive" rights of review for both parties, Mr. Yates was referring to GAO, not judicial, review.

The court also quotes from the testimony of John C. Hayes, counsel for the Associated General Contractors of America, Inc. At one point Mr. Hayes stated, as the court quotes, that the position of his organization was that:

• • • any decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based.

Id. at 29. The court fails, however, to quote later testimony of this witness which adds a vital gloss to the quoted testimony:

In concluding, we respectfully urge that this committee draft legislation that will grant the United States Court of Claims, and the United States district courts to the extent that they now exercise jurisdiction concurrent with the United States Court of Claims, jurisdiction to hear, determine, and enter judgment against the United States on any claim in which the contractor shall seek a review of a decision on a disputed question between the United States and such contractor, made by an officer, board, or other representative of the United States under any contract entered into with the United States. [Emphasis supplied.]

Id. at 30. Clearly, looking at his testimony in its entirety, Mr. Hayes was of the opinion that the Government's rights in contract disputes were adequately protected by the "disputes" clause, which reposes decision-making authority in

the Government agencies, and that judicial review was needed only to protect the rights of contractors.

The House Committee report accompanying the final draft of the act as passed in 1954 states, unequivocally, that the purpose of the act—the only purpose—was “to overcome the effect of the Supreme Court decision in the case of *United States v. Wunderlich* [sic] (321 U.S. 98), rendered on November 26, 1951, under which the decisions of Government officers rendered pursuant to the standard disputes clauses in Government contracts are held to be final absent fraud on the part of such Government officers.” H.R. REP. No. 1380, 83d Cong., 2d Sess. 17 (1954). Thus, the express legislative purpose underlying the act was to do no more than reopen the channels of judicial review of decisions of Government officials pursuant to the “disputes” clause to the extent they had been open prior to the *Wunderlich* decision. Prior to *Wunderlich*, the Government could obtain such review of board decisions adverse to it only in those rare situations when, for fraud or other such compelling reasons, the General Accounting Office could and did set aside a “disputes” clause decision in favor of a contractor.

Perhaps the strongest support for my conclusion that the *Wunderlich* Act was not intended to provide the Government with the right of judicial review of adverse board decisions lies in the fact that Congress explicitly refrained from granting the GAO any greater power under the act than it already possessed. The House hearings reflected more than passing concern with that portion of a House bill² and the Senate bill, which gave the GAO, along with

²One of the bills under consideration, sponsored by the GAO, was H.R. 1839, 83d Cong., 1st Sess. (1953):

“• • • That no provision of any contract entered into by the United States, relating to the finality or conclusiveness, in a dispute involving a question arising under such contract, of any decision of an administrative official, representative, or board, shall

the courts, the power to review "disputes" clause decisions. The position of many of the opponents of this provision was well stated in a letter to the Chairman of the House Committee on the Judiciary from Mr. Roger Kent, general counsel of the Department of Defense:

To superimpose General Accounting Office review on existing disputes clause procedures would not only create a completely new review, it would, as a practical matter, eliminate the usefulness of the disputes clauses themselves by destroying the concept of finality and dividing the responsibility for determining the merits of any given appeal. Undoubtedly, this would generate protracted and expensive disagreements among Government agencies, the General Accounting Office and contractors representatives. This would defeat the aims of both the Government and its contractors by making it impossible to accomplish the very purposes of the disputes clause; i.e., the achievement of proper and expeditious performance of contracts.

Hearings on H.R. 1839, S. 24, H.R. 3634, and H.R. 6946 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 82d Cong., 1st and 2d Sess., ser. 12, at 132 (1953-54).

In the end, the opponents prevailed and the objectionable provision was dropped. More importantly, however, the report accompanying the bill in its final form was careful

be pleaded as limiting judicial review of any such decision to cases in which fraud by such official, representative, or board is alleged; and any such provision shall be void with respect to any such decision which the *General Accounting Office* or a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. [Emphasis supplied.]

"SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative, or board."

to explain that the bill would not alter in any way the jurisdiction of the GAO:

The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.³

H.R. REP. No. 1380, 83d Cong., 2d Sess. 23 (1954). What, then, was the jurisdiction of the GAO before the adoption of the Wunderlich Act?

The Budget and Accounting Act of 1921, 31 U.S.C. §§ 71-134 (1964), conferred upon the GAO basic audit and settlement authority.⁴ As early as 1922, however, the Supreme

³ The report also states: "It is intended that the General Accounting Office, *as was its practice*, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill." [Emphasis supplied.] H.R. REP. No. 1380, 83d Cong., 2d Sess. 23 (1954). As will be shown, however, this unfortunate statement resulted from a misunderstanding of the former practice of the GAO in reviewing board awards. "While the legislative history contains some conflicting statements, on balance it does indicate that Congress did not intend to set GAO up as an additional layer of administrative appeal for contractors on disputes clause questions." 42 OP. ATT'Y GEN. 33 (1969).

⁴ The relevant provisions of the act are as follows:

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." [31 U.S.C. § 71 (1964).]

"Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments,

Court made it perfectly clear that the GAO had "no power" to upset the decision of a contracting officer where the authority to render that decision had been given to the contracting officer by the terms of the contract. *United States v. Mason & Hanger Co.*, 260 U.S. 323 (1922). Perhaps the most quoted language relating to the powers of the GAO in these matters is found in the district court's opinion in *James Graham Mfg. Co. v. United States*, 91 F. Supp. 715 (N.D. Cal. 1950):

The powers of the Comptroller General are extensive and broad. But he does not, *absent fraud or overreaching*, have authority to determine the propriety of contract payments when the contracts themselves vest the final power of determination in the contracting executive department. * * * [Footnote omitted, emphasis supplied.]

Id. at 716.⁵

Decisions of this court prior to passage of the act, likewise, leave no room for doubt that, except in cases where fraud or overreaching was involved, this court viewed as wholly without legal effect the action of the GAO in over-

may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement." [31 U.S.C. § 74 (1964).]

"The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification." [31 U.S.C. § 82d (1964).]

⁵ See also *Leeds & Northrop Co. v. United States*, 101 F. Supp. 999 (E.D. Pa. 1951); *Consolidated Vultee Aircraft Corp. v. United States*, 97 F. Supp. 948 (D. Del. 1951).

turning a decision by a Government officer authorized by the contracting parties to be the deciding authority on disputes arising under the contract. See, e.g., *Bell Aircraft Corp. v. United States*, 120 Ct. Cl. 398, 100 F. Supp. 601 (1951), *aff'd*, 344 U.S. 860 (1952); *McShain Co. v. United States*, 83 Ct. Cl. 405 (1936); *Maryland Dredging & Contracting Co. v. United States*, 66 Ct. Cl. 627 (1929).

It thus becomes apparent that if the legislative intent underlying the Wunderlich Act is to be given proper effect, the jurisdiction of the GAO to overturn board decisions under the "disputes" clause must be restricted to those instances where such decisions are produced through fraud or overreaching. In this case, our commissioner found that "the record is wholly devoid of any indication that the administrative decisions favorable to the plaintiff were tainted by fraud or overreaching." In *Climatic Rainwear Co. v. United States*, 115 Ct. Cl. 520 (1950), this court held that, where the parties to a Government contract agree that a designated Government official is to determine factual disputes between the parties, "[t]he discharging of these functions could neither be delegated to nor usurped by anyone not authorized by the terms of the contract." *Id.* at 559. See also *New York Shipbuilding Corp. v. United States*, 180 Ct. Cl. 446, 385 F. 2d 427 (1967). While it is not clear, in this case, whether the AEC "delegated" authority to the GAO or the GAO "usurped" the AEC's authority under the "disputes" clause, it is clear that one of those two events must have occurred. For the foregoing reasons, I can only conclude, as did our commissioner in his excellent and well-reasoned report, that the GAO acted without authority in advising the AEC that none of the disputed claims was supported by substantial evidence, that all were erroneous on matters of law, and that payment on any of them would be improper.

In the present case, this court, by an act of judicial legislation, is doing what Congress specifically refused to

do legislatively, i.e., the court is effectively conferring upon the GAO authority to review final administrative decisions under the "disputes" clause of Government contracts for the purpose of ascertaining whether such decisions are supported by substantial evidence and otherwise meet the criteria set out in the Wunderlich Act. Moreover, the court is conferring such authority without imposing upon the GAO any collateral requirement that it grant procedural due process to contractors in exercising the power of review. This is both unfair and exceedingly disadvantageous to persons who enter into contracts with the Government.

This brings me to a consideration of the court's holding that a refusal by the Government to pay a board award is not a breach of the "disputes" clause, *even though the refusal results "from a change of heart in the agency itself,"* if the involved award is not entitled to finality under the Wunderlich Act.⁶ [Emphasis supplied.] To hold to the contrary, the court reasons, would violate the terms of the act.

As I have pointed out previously, the act had, and has, a very limited purpose—to overcome the effect of the *Wunderlich* decision. Since, at the time that decision was rendered, it would have been unprecedented for an agency to repudiate, or to seek judicial confirmation of, its own decision, I find it difficult to believe that Congress ever intended to confer this right which would vastly change the disputes procedure. Congress' intent, express and implied, was to return to the disputes process as it had existed before *Wunderlich*, not to introduce radically different, new elements into that process.

A brief look at the realities of the disputes procedure reveals that Congress could never have intended that the

⁶ It should be noted that, in this case, the AEC never had a "change of heart." The agency never reversed its determination of plaintiff's claims; its refusal to pay was based solely on the implied threat of the Comptroller General.

act be read as the court reads it. When a dispute arises between a contractor and the Government, the "disputes" clause sets out clearly the procedure to be followed.⁷ First, the parties may voluntarily settle the dispute. If they do, that is the end of the matter. If no settlement is reached, the disputed matters are decided by the agency's contracting officer. If the contractor does not appeal to the agency from the contracting officer's decision within the prescribed time, that, again, is the end of the matter. If, however, the contractor does appeal to the agency, then, according to the court, a decision rendered by the agency or its board⁸ fa-

⁷ The "disputes" clause which was included in the contract between plaintiff and defendant is as follows:

"(a) . . . [A]ny dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission . . . shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. . . ."

"(b) This 'Disputes' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

⁸ The following provision of the Armed Services Procurement Regulations is instructive both as to the relationship between the agencies and their boards of contract appeals and as to the expectations of the parties when entering into a contract containing a "disputes" clause:

" . . . Decisions of the Armed Services Board of Contract Appeals constitute decisions of the Head of the Department as referenced in the Disputes clause standard in all Government con-

avorable to the contractor is not the end of the matter; the agency is free at any time to disavow or repudiate its own decision, thereby forcing the contractor to sue. The anomaly created by the court's decision is too obvious to need elaboration. While an agency will still be bound by the decisions of its contracting officers, it will not be bound by decisions made at the highest level.⁹

The suggestion that the Government, after deciding a contract dispute with one of its contractors in favor of the contractor, can then promptly disavow that decision carries with it an enormous potential for mischief. It means that the Government, after deciding that its contractor's claim is meritorious, based on a *preponderance* of the evidence presented to it, can then turn around and reject the claim because there is *substantial* evidence (i.e., less than a preponderance) to support the opposite result. The majority opinion puts a tremendous economic burden on Government contractors who are now faced with the prospect of prolonged judicial proceedings in order to collect funds to which the agencies have already found them entitled. After today's decision the Government would be foolish to pay *any* board awards.

tracts. *It is expected that decisions favorable to the appellant in whole or in part will be promptly implemented by payment at the contracting officer level. * * ** [Emphasis supplied. 32 C.F.R. § 1.314(g) (1970).]

The prompt payment of a claim by a contracting agency which has found it valid is the principal consideration for the unusual obligation of a Government contractor to proceed with the work while his claim is being considered.

⁹ In *Maitland Bros.*, ASBCA No. 6607, 65-1 BCA ¶ 5416, the Armed Services Board of Contract Appeals held that the unappealed decision of a contracting officer, under a disputes clause, becomes final and conclusive on both parties, "thereby creating vested rights in such decision." *Id.* at 25,430. If a contracting officer's decision can create vested rights in a contractor, it seems illogical to conclude, as does the court, that the decision of the agency, made at the highest level, cannot create such rights.

Moreover, the court's decision will utterly defeat the purpose and utility of the "disputes" clause, which has served admirably over the years; and will seriously hamper the Government in virtually all its activities whenever it is forced to call on the resources of private firms. The purpose of the clause has been to promote the expeditious performance of Government contracts. By destroying the finality of board decisions favorable to contractors, the court has assured that the performance of Government contracts will be anything but expeditious. Protracted and expensive litigation has never been known for its beneficial effect on contract performance.

It should also be noted that contract prices in the future can only be expected to rise substantially due to increased contingency costs. The court's decision effectively removes any incentive which agencies, undeterred by the costs of litigation, might have to implement board decisions by payment. Indeed, the decision gives the agencies negative incentive. We would be foolish to think that contractors will overlook, in preparing bids, the vast potential for economic coercion which today's decision places in the hands of the Government and the many locations within the bureaucracy where this potential will lie. Furthermore, this rise in contract prices will undoubtedly far exceed whatever the Government might save in those rare instances when this court or another would overturn an agency decision in favor of a contractor.

Refusing to permit agencies to disavow their own decisions would by no means make the Government easy prey for the ill founded claims of contractors. In the first place, the "disputes" clause itself puts the power of decision making in the hands of the Government. It would not be speculative to assume that, if the boards established by the Government for this purpose err, they err in favor of the Government. As Justice Jackson said, dissenting in *Wunderlich*, "[m]en are more often bribed by their loyal-

ties and ambitions than by money.” 342 U.S. at 103. Secondly, the GAO still has the authority to review board decisions for fraud or overreaching.

The statements in *C. J. Langenfelter & Son v. United States*, 169 Ct. Cl. 465, 341 F. 2d 600 (1965), and *Acme Process Co. v. United States*, 171 Ct. Cl. 251, 347 F. 2d 538 (1965), upon which the court relies for substantiation of its position, to the extent they are inconsistent with the views expressed herein, should be recognized for their unwisdom and overruled.

In conclusion, I would hold that the Wunderlich Act does not, and was never intended by Congress to, invest the federal agencies or their counsel with authority to challenge the decisions which the agencies themselves have made pursuant to a contractual provision, and that a failure by such an agency to pay an award arrived at pursuant to a “disputes” clause results in a breach of that clause.¹⁰ If the disputes procedures, which contractors must accept if they are to obtain Government contracts, are to serve the purpose of expediting the performance of contracts, it is absolutely essential that decisions adverse to the Government rendered by boards of its own creation be imbued with finality. Certainly the Wunderlich Act was never designed to bring about the chaos which I fear will be the result of the court’s decision.

¹⁰ See *United States v. Marietta Mfg. Co.*, 268 F. Supp. 176 (S.D. W. Va. 1967). In that case the court held that the Government’s failure to follow the disputes procedures, as found in its Federal Procurement Regulations and in the contract, was a breach of the contract.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

70-88

No. ~~1398~~

S&E CONTRACTORS, INC.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS**

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(i)

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No.

S&E CONTRACTORS, INC.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF CLAIMS**

Petitioner requests that a writ of certiorari be issued to review the decision of the United States Court of Claims in this case (No. 104-67) which was entered on November 30, 1970.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, pp. A-1 to A-44) will be reported in 193 Ct. Cl. ____; 433 F.2d 1373 (1970). The report and conclusion of law of the commissioner of that court (App. B, *infra*, pp. B-1 to B-30) is unreported. The opinion of the Comptroller

General of the United States (App. C, *infra*, pp. C-1 to C-48)¹ is reported at 46 Decs. Comp. Gen. 441 (1966).

JURISDICTION

The opinion of the United States Court of Claims was entered on November 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).²

QUESTION PRESENTED

Whether the court below was correct in holding that, under the "Wunderlich" Act, 41 U.S.C. §321-22, the United States has a right—assertable by the General Accounting Office or the Department of Justice or a contracting agency itself—to withhold payment on an

¹ Appendix C contains only that section of the Comptroller General's opinion that is relevant to the question presented in this case.

² The opinion which the Petitioner seeks to have reviewed is not a final judgment granting or denying relief. However, that opinion does finally determine an important right in issue, namely, the right of the Government, in the absence of fraud or overreaching, to refuse to make payment to a contractor pursuant to an administratively final disputes clause decision and, by such refusal, force the matter into the Court of Claims for reexamination there under Wunderlich Act standards.

The jurisdictional statute (28 U.S.C. 1255) does not contain any requirement of finality, nor does such a limitation appear in this Court's applicable rules, (U.S. Sup. Ct. Rules 19-23). Further, this Court's jurisdiction to review interlocutory orders of the Court of Claims that finally determine the rights of the parties to a contract on issues other than liability has been recognized by the decisions in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966) and *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966).

administratively final "disputes" determination in favor of a contractor (even though the contracting agency itself had earlier agreed to its finality and no fraud or overreaching is involved) in order to precipitate judicial review of the administrative determination by forcing the contractor to seek his payment in court.

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent provisions of the statute and the contract involved are set forth in Appendix D, *infra*, pp. D-1 to D-2.

STATEMENT

1. *Background*—The "disputes clause" is a provision common to all Government contracts. Its purpose is to secure immediacy in the resolution of contract disputes and promptness in paying a contractor for any additional work which he may have been caused to perform and finance because of Government action. Petitioner in this case performed such additional work in 1961. In 1964, pursuant to an adversary proceeding under the disputes clause, it was established that Petitioner was entitled to be paid. The contracting agency ordered that immediate payment be made. However, the obligation remains unsatisfied to this day.

There are two reasons for this delay. First, the General Accounting Office claims that Congress, through the Wunderlich Act, 41 U.S.C. §321-22, has given it the right to conduct *ex parte* reviews of "disputes" decisions and to rewrite such decisions whenever it thinks the evidence weighs in favor of a different result. The GAO performed such a review and revision here. It took thirty-three months.

The second reason for the delay is that the Department of Justice believes that it too was given authority by Congress under that same Act to reexamine a "disputes" decision and to bar payment thereon whenever it thinks the facts favor a different result. The Department of Justice performed such a review here. Petitioner's "disputes" decision has been in litigation ever since. No question of fraud or overreaching was, or is involved, in the case. A fuller statement of the facts follows.

On August 4, 1961, the United States, acting through the Atomic Energy Commission (hereinafter also referred to as AEC or Commission), awarded Petitioner a competitively-bid construction contract in the amount of \$1,272,000 for the building of a section of a nuclear testing facility at the National Reactor Test Station in the State of Idaho. The originally specified performance period was for 180 days. The contract was executed on U.S. Standard Form 23 (1953 ed.) including the standard general provisions, Form 23A, with the standard adjustment clauses for "changes", "changed conditions", "time extensions, etc." and additional general provisions containing a standard "suspension of work" clause. Further, the contract included a modified standard "disputes" clause (App. D, *infra*, p. D-1) which provided for the resolution of "any dispute concerning a question of fact arising under this contract" by the Contracting Officer subject to a timely appeal to the Atomic Energy Commission whose decision shall be final and conclusive "unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."

The work was completed and the test facility was accepted by the Government on June 29, 1962, 325 days after issuance of the notice to proceed.

During performance of the work, Petitioner submitted a number of claims to the Contracting Officer asking for equitable adjustments in contract price and time. These claims were decided by the Contracting Officer on August 8, 1962. The decision was, in general, adverse to Petitioner. Accordingly, pursuant to the contract's disputes procedures, a notice of appeal from the decision was timely filed with the AEC. Certain additional claims, denied by the Contracting Officer on October 22, 1962, were consolidated with this appeal.

2. Administrative Proceedings

Nine distinct claims, seeking approximately \$1,950,000, were presented to the Commission. In accordance with then existing AEC contract appeal procedures, the appeal was referred to a hearing examiner designated to hear grievances arising under the disputes provision and to render decisions thereon. A full adversary proceeding was had in the matter which took thirteen days to complete. The examiner's understanding of the case was facilitated by a visit to the jobsite, by a specially built model of the testing facility, which was placed in evidence with appropriate explanatory testimony, by extensive documentary support for each of the claims in issue, and by witnesses whose transcribed testimony amounted, in final form, to approximately two-thousand, eight hundred pages of trial transcript. On July 3, 1963, five months after the hearing ended, the examiner's decision was issued. Eight of Petitioner's claims were sustained.

Thereafter, by order of the examiner, the matter was remanded to the Contracting Officer for negotiation "without delay" of a final settlement in accordance with the outlines of liability that he had determined. However, contrary to this directive, the Contracting Officer

sought, and was granted, an opportunity to file out time a petition for a full Commission review of the hearing examiner's decision. On November 14, 1963, the Commission issued a memorandum and order granting, in part, the Contracting Officer's request for review and also directing the immediate payment to Petitioner of certain earned sums which the Contracting Officer had retained.

On May 13, 1964, a final decision was handed down by the full Commission which modified the hearing examiner's decision on one claim, reversed it on another, affirmed the remaining claims, and remanded the matter to the Contracting Officer with instructions to diligently proceed to a final settlement of Petitioner's claims. With this last action by the Commission, the administrative remedies open to the contracting parties under the contract's disputes clause came to an end.

3. Intervention of the General Accounting Office

By letter dated March 6, 1964, a certifying officer of the AEC had sought advice from the General Accounting Office (hereinafter also referred to as GAO) as to whether there could be offset from the "retainage" due Petitioner certain monies then owing by S&E to its suppliers, the claims for which had been assigned to the Commission. This same letter also requested advice regarding that portion of the retainage which was said to represent damages due the Government resulting from its liability to a follow-on contractor because of a delay in site availability allegedly caused by S&E. In connection with this last mentioned request, it should be noted that the merits of the Government's right to withhold any sum on account of contractor-caused site delay had been conclusively settled by the hearing examiner's prior decision (he had found that S&E was not responsible for any

delay in performance). Moreover, neither this question nor any of its subsidiary elements was then the subject of the review pending before the Atomic Energy Commission. It was, in other words, a closed question at the time the GAO was asked to render its advice.

On December 5, 1966, thirty-three months after it had received the certifying officer's request for specific advice on the treatment of the retainage items, the GAO handed down a two hundred and sixty page opinion (App. C, *infra*, pp. C-1 to C-48)³ which treated in detail with each of the various claims, and the evidence in support thereof, that had previously been decided by the hearing examiner and the AEC in favor of Petitioner. Based upon its *ex parte* review of the evidence, the GAO concluded that "the decision rendered by the Hearing Examiner on June 26, 1953, as reviewed by the Commission, fails to meet the requirements of the Wunderlich Act on material questions of fact and is erroneous on several material questions of law . . ." (46 Decs. Comp. Gen. at 544) The GAO advised the Commission that S&E Contractors, Inc. had no valid claim against the Government, and on March 27, 1967, Petitioner was informed by the Commission that it would take no action in connection with the claims it had previously recognized which was inconsistent with the views that had been expressed by the General Accounting Office. Jurisdiction to intervene in the contractual disputes process was claimed by the GAO to have been "clearly conferred by the basic settlement and audit authority granted by the Budget and Accounting Act, 1921." (App. C, *infra* p. C-22)

³ Appendix C only contains that section of the GAO's opinion which is relevant to the jurisdictional question raised in this opinion. The full text of the opinion is reported at 46 Decs. Comp. Gen. 441 (1966).

4. Proceedings in the Court of Claims

Petitioner brought suit in the Court of Claims on April 11, 1967, pursuant to 28 U.S.C. § 1491. On September 29, 1969, the Commissioner of that court submitted a report recommending the allowance of S&E's motion for summary judgment based on the theory that the Commission's failure to have made payment to Petitioner in accordance with the entitlement established by the disputes clause proceedings was a breach of contract. (App. B, *infra*, pp. B-1 to B-30) In support of this result, the Commissioner relied on the language of the contract's disputes clause and the statement made by this Court in *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966) that respect should be accorded the parties' rights to contract and to provide for their own remedies. The GAO's actions in the matter were deemed by the Commissioner to have been in excess of its authority.

In subsequent proceedings before the Court of Claims, the Government took the position that the issue of the GAO's authority was totally irrelevant to any issue in the case. The only matter for consideration—from the Government's point of view—was its right to judicial review of administrative adjudications subject to the terms of the Wunderlich Act. And this right to seek such review was said to be a matter which the Department of Justice was free to decide for itself, independent of any prior GAO action, and notwithstanding any contractual commitment on the part of an executive agency to honor the finality of its decisions under the standard Government contract disputes clause.

An amicus curiae brief was filed by the GAO setting forth that office's views with respect to its jurisdiction to intercede in the contract disputes process. Its position was that the power exercised by it in this case derived

from its authority to audit and settle the accounts of executive officers. This it described as an executive function in the performance of which it was acting as a member of the executive branch. The point was made too that action of the type it had taken in this case was fully anticipated and intended by the Congress when it passed the Wunderlich Act. The GAO agreed, however, with the position taken by the Department of Justice, namely, that the question of the authority exercised by the GAO in this matter was totally irrelevant.

On November 30, 1970, the Court of Claims, by a 4-3 decision, upheld the Government's right to seek judicial review, based upon Wunderlich Act standards, of the contract disputes decision favorable to Petitioner. (App. A, *infra*, pp. A-1 to A-44) The court's majority was of the view that it made no difference whether the failure to pay a contractor resulted from a threat of the General Accounting Office to charge a certifying officer's account, (as occurred in this case), or "from a change of heart"⁴ in the contracting agency itself. In either event, the Government was entitled to withhold payment and thereby force judicial review of the final disputes decision.

The dissenting opinion of Judge Skelton, with which Chief Judge Cowen and Judge Collins concurred, stressed the fact that, where as here, there had been no disavowal by the contracting agency of its own final disputes decision, the Department of Justice could not, on its own initiative, seek review of a settled contract matter. And, as to whether a contracting agency could,

⁴ This language is the court's own. The opinion below leaves open by whom, in the agency, the "change of heart" may be brought about.

in fact, seek review of its own administrative decision—have “a change of heart” as the majority put it—Judge Skelton felt that was a point not to be answered until the issue was squarely presented. With respect to the authority exercised by the General Accounting Office in this case, Judge Skelton, as well as Judge Collins in his separate dissenting opinion, disagreed with the majority’s acceptance of the role played by the GAO. To all of the dissenters, the GAO’s actions reached beyond that office’s historically recognized statutory limits.

As a consequence of the Government’s delay in payment in this case, the Petitioner has been unable to continue in business.

REASONS FOR GRANTING THE WRIT

In this case, the Court of Claims, in a sharply divided opinion, overruling its Commissioner, has announced a far-reaching rule governing the standard disputes clause contained in every Government contract that deprives administrative contract appeal board decisions in favor of a contractor of the finality such decisions have always been accorded. This rule is contrary to the language and history of the disputes clause and upsets the settled administrative practice upon which contractors, their suppliers, and financial institutions have long relied. Not since this Court’s own decision in *United States v. Wunderlich*, 342 U.S. 98 (1951) has there been a court decision of more sweeping significance to the administrative disputes process pursued under Government contracts than the decision in this case.

As the court below stated it, the issue in the case was “whether the ‘Wunderlich’ Act, 41 U.S.C. §§321-22 [App. D, *infra*, p. D-1] . . . affords the Government a right to obtain judicial review—coextensive with that of

the contractor—of decisions of administrative tribunals unfavorable to it, on contract claims made in the course of the standard ‘disputes’ procedure” (App. A, *infra*, p. A-1 to A-2) To answer this question, the court looked to the legislative history of the Wunderlich Act and concluded that that history “albeit not explicitly, in general supports [a] construction” [that] “judicial review to whatever extent prescribed, seems extended equally and under like conditions to both contracting parties.” (App. A, *infra* p. A-5) On the strength of this conclusion, the court decided that although an agreement to pay a contractor’s claims had been reached administratively, the facts in support of that agreement—previously determined through a full adversary proceeding—were open to independent, *ex parte* challenge by the General Accounting Office, (as was the case here), could independently be reexamined and relitigated by the Department of Justice, or could be disavowed by the contracting agency that rendered the administrative determination. By virtue of the court’s decision, each of these Governmental bodies may now bar payment of the contractor’s favorable administrative determination, (even though, as in the instant case, no question of fraud or overreaching is involved), and, in that manner, precipitate judicial review by forcing the contractor to bring suit for payment in the Court of Claims.

The rule announced by the Court of Claims is without foundation in the legislative history of the Wunderlich Act, is not compelled by the text of that Act, has no support in relevant decisional law of this Court and is directly contrary to governing procurement regulations.

We submit that the rule announced in this case (1) destroys the integrity of the contract by permitting the Government to dishonor its promise of immediacy in the

resolution of disagreements in return for a contractor's commitment to proceed diligently, and at his own expense, in the performance of disputed work, (2) robs the disputes clause of its reason for being by discouraging contract settlements, by inviting long delays in payment, and by totally disrupting what has heretofore been an orderly process, (3) foments litigation by encouraging collateral attack and places a consequent unfair burden upon successful contractors to further litigate their claims and (4) imposes a needless and unwarranted burden upon administrative and judicial machinery.

Review by this Court is necessary to correct a situation which, if left as is, will severely impair the entire system of funding and financing of Government contracts—with attendant unwillingness (and financial inability) of contractors to undertake such work—and destroy the long acknowledged effectiveness of the disputes process. Neither contractors nor the Government agencies with whom they do business can live with a system where finality in contract matters is nowhere to be honored save in the courts.

1. The Text And Legislative History Of The Wunderlich Act Reject The Conclusion Of The Court Of Claims That Congress Intended That Act To Be Used As A Basis For Inviting Collateral Attack Upon Final Administrative Decisions Favorable To A Contractor

The purpose of the Wunderlich Act⁵ was to restore to contractors their right of access to the courts in order

⁵ The text of the Act is set forth in Appendix D, *infra*, p. D-1.

to obtain judicial review of adverse administrative decisions. This remedial legislation had become necessary as a result of this Court's decision in the case of *United States v. Wunderlich*, 342 U.S. 98 (1951) where it was held that decisions of Government Officers rendered pursuant to the standard disputes clause in Government contracts were final absent fraud on the part of such officers. The second purpose of the Wunderlich Act was to prohibit the insertion in Government contracts of provisions making the decisions of Government officers final on questions of law arising under such contracts. In the case of *United States v. Moorman*, 338 U.S. 457 (1950) this Court had upheld the validity of such provisions on the ground that "no congressional enactment condemns their creation or enforcement." 338 U.S. at 460.

The chief reason given by the court below for its construction of the Wunderlich Act was that "Congress through the [Wunderlich] Hearings received a presentation emphasizing more the need for courts of competent jurisdiction to be open to both parties." (App. A, *infra*, p. A-8) This observation, we submit, is incorrect and irrelevant. The question is not what Congress was asked to do. The question is what it did do. And on this point, the legislative record is too certain to warrant statutory construction through conjecture: Attempts by the GAO to gain authorization to encroach upon the disputes process were universally opposed because of the uncertainty and disruption of that process that would thereby be created. Congress responded by passing legislation which made no mention of that office. Significant also to the issue in this case is the fact that no other Governmental agency, other than the GAO, sought authority to reexamine an administratively final decision in favor of a contractor. Hence, to hold, as the court below did, that the Wunderlich legislation should give a contracting

agency or the Department of Justice the authority to bar payment on a settled question of liability in order to precipitate judicial review is plainly without any legislative support whatsoever. Moreover, the court's view seems to completely ignore the fact that, in every case, it is always open to the United States to bring suit in a proper forum for the recovery of monies erroneously paid.

The Court of Claims seriously misreads the Wunderlich Act when it interprets that statute as dictating a requirement for judicial review of every final disputes decision favoring a contractor regardless of whether the Governmental action precipitating the contractor's suit was acting within its lawful bounds or not. We support our argument in part by a brief review of the legislative history.

Legislative History Of the Wunderlich Act

Shortly after the *Wunderlich* decision, bills were introduced in the 82d Congress to remedy the effect of that case. These bills, H.R. 6214, H.R. 6301, H.R. 6338, H.R. 6404 and S. 2487, had a common feature—none mentioned the General Accounting Office. The Comptroller General of the United States voiced objection to this fact. His position was that, absent a provision in the bills providing for review of decisions of administrative officers by the General Accounting Office, that office would be precluded from questioning the legality of payments made to a contractor.⁶

In the 83rd Congress, new legislation was introduced. Two of these bills, S.24 and H.R. 1839, contained language responsive to the Comptroller General's

⁶ *Hearings Before A Subcommittee Of The Senate Committee On The Judiciary, 82d Cong., 2d Sess. 7, 10, 118 (1952).*

prior objections—the bills permitted the General Accounting Office to review disputes decisions on the same grounds allowed the courts. These two bills met strong objection from both Government and industry. The Department of Defense, for example, saw the reference to the General Accounting Office as causing difficulty to contractors particularly in regard to the bankability of their contracts.⁷ Industry took exception on many grounds: the GAO would impair decisions of the several boards of contract appeal,⁸ render the disputes clause a useless provision by dividing the responsibility for determining the merits of any given appeal and lead to protracted litigation between contractor and contracting agency.⁹

The views expressed in opposition to the GAO's inclusion in the proposed legislation led to the deletion of any reference to that office from S.24. This "substitute" bill, which became the Wunderlich Act, was acceptable to the GAO because, according to the Comptroller General, it would restore that office to the position it held prior to the *Moorman* and *Wunderlich* decisions.¹⁰ The substitute was acceptable to industry because it deleted the earlier bill's grant of authority to the GAO to review administrative decisions under the disputes clause;¹¹ hence the GAO would not have authority to set aside administrative decisions on questions of fact

⁷ *Hearings Before Subcommittee No. 1 of the House Committee On the Judiciary*, 82d Cong., 1st & 2d Sess. 54 (1953, 1954).

⁸ *Id.* at 105

⁹ *Id.* at 93

¹⁰ *Id.* at 136

¹¹ *Id.* at 76

arising under a Government contract,¹² and the appellate procedures provided by the Government boards of contract appeal would not be disrupted.¹³ One witness suggested that the GAO might still be able to rely upon the wording of the substitute bill and its legislative history to permit it to reverse an administrative decision for lack of substantial evidence. Congressman Willis, a member of the Committee, questioned how this could be possible, "...when GAO has been left out deliberately as compared to S.24?"¹⁴

The legislative history of the Wunderlich Act does not explain why the General Accounting Office was willing to abandon the position it had taken in regard to the Wunderlich legislation which was that, absent statutory coverage for the GAO in the new legislation, that office would be precluded from questioning decisions made under disputes provisions.¹⁵ It is clear, however, that the effect of the substitute bill, as a recent Attorney General opinion has described it, "was to forego any legislative grant of jurisdiction to the GAO, while leaving it free to exercise, unchanged, whatever independent statutory authority it already had."¹⁶ And concerning that authority, the history of the administrative evolution of

¹² *Id.* at 122

¹³ *Id.* at 105, 106

¹⁴ *Id.* at 110

¹⁵ *Hearings Before A Subcommittee Of The Senate Committee On The Judiciary*, 82d Cong., 2d Sess. 10(1952).

¹⁶ 42 Ops. Att'y. Gen. No. 33 at 6 (1969).

the disputes clause lends persuasive support to the view that the GAO never regarded its authority to be so far-reaching as to encompass the right to question facts administratively resolved.¹⁷

Through its decision in this case, the Court of Claims has sanctioned an exercise of independent authority by the General Accounting Office (and by other Government arms as well) which, for all intents and purposes, permits that office to assert control over final disputes decisions in a manner precisely the same as would have been exercised had reference to the GAO been expressly included in the final Wunderlich legislation. It is obvious that such a result reduces the Wunderlich hearings and intent of Congress to a nullity, and makes the administrative disputes process the source of further litigation rather than the end of litigation. No matter how broadly one could draw the GAO's independent authority, the Wunderlich history clearly forces rejection of the principle that that authority could be used, as it was in this case, to accomplish an end result which contractors opposed, which Congress deliberately sought to avoid and which the Comptroller General himself stated would require express statutory authorization.

¹⁷ See Shedd, *Disputes and Appeals: The Armed Services Board Of Contract Appeals*, 29 Law & Contemp. Prob 39, 49 (1964) and Statement during Wunderlich Hearings of O.R. McGuire, former counsel to Comptroller General: "I do not believe he [i.e., the Comptroller General] should review the facts and I do not believe that he claims that his office [i.e., the GAO] should review the facts." *Hearings Before A Subcommittee Of The Senate Committee On The Judiciary*, 82d Cong., 2d Sess. 41 (1952).

At the beginning of the Wunderlich hearings, the Comptroller General warned that:

It would be a serious mistake for the Congress to consider and enact legislation on 'finality clauses' in Government contracts without clarifying the jurisdictional lines between the administrative offices, the General Accounting Office and the courts under the Tucker Act.¹⁸

The decision in this case bears out the wisdom of that prophecy.

2. **The Comptroller General's Authority to Intervene In The Administrative Disputes Process Requires Specific Statutory Authority Or A Right Given By Contract. In The Absence Of Such Rights, His Intervention Results In A Breach Of Contract.**

In *United States v. Mason & Hanger Co.*, 260 U.S. 323 (1922), this Court dealt with a question involving the authority of the Comptroller of the Treasury (predecessor of the Comptroller General) over contract payments. The Court held that where the parties had, by contract, reserved to the contracting agency itself the right to make the final determination regarding costs chargeable to the contract, it was not open to the Comptroller to question the decision which the administrative officers had made. Although *Mason & Hanger*

¹⁸ *Hearings Before A Subcommittee Of The Senate Committee On The Judiciary*, 82d Cong., 2d Sess. 6 (1952).

predates the Wunderlich Act, nevertheless that decision bears directly upon the problem here involved.

In its brief to the Court in that case, the Government had argued that "neither a contracting officer nor any other officer of the Government could deprive the Comptroller of the Treasury of his statutory power and duty to see that no money was paid from the Treasury except such as the United States was legally bound to pay."¹⁹ Also, it was contended that no contract could lawfully be made which would have such an effect. This Court decided otherwise. It said that the parties could contract to achieve finality and that, over payments made pursuant to such final decisions, "the Comptroller of the Treasury has no power." 160 U.S. at 326.

The Court, in its decision in *Mason & Hanger*, was guided by the principle that, when the United States enters into contract, it obtains rights and incurs responsibilities similar to those of the private individuals who are the parties to those contracts. One aspect of that principle—clearly demonstrated by the result in *Mason & Hanger* and of primary importance here—is that the powers of the Comptroller's office in regard to contract payments are such that they may be subordinated to other rights and obligations which an executive agency may lawfully create through contract.

And so, the exercise of those powers may be denied by the force of a contract provision (which was the case in *Mason & Hanger* where the contract made the Contracting Officer's decision final) or simply through the

¹⁹ Brief for United States, Petitioner, p. 17, No. 121, Oct. Term 1922, *United States v. Mason & Hanger Co.* 260 U.S. 323 (1922).

more fundamental proposition of contract law which denies a voice to one who is not a party to the agreement. Respect for the integrity of contract is the controlling principle.

Today, the Comptroller General claims the right to intercede in contract matters on the basis of the Wunderlich Act. Though it is clear that that Act does no more than restrict the degree of finality to be accorded to a final administrative decision in a court of law, the Comptroller General sees this Act as being sufficient to vest his office with authority over contract matters no less extensive than that of the courts and exercisable in every instance where a court itself might declare the rights of the parties on a matter properly brought before it.

We know of no decision of this Court that supports the Comptroller General in this unique view of the powers of his office. To the contrary, *Mason & Hanger* should have made the point clear that the power of the Comptroller General to exercise whatever authority he does possess depends entirely upon contract recognition being given to that authority. If this were not so—if his authority were exercisable notwithstanding the contract language (which was the very point the Government had argued in that case)—then the *Mason & Hanger* case would have been decided otherwise.

3. Governing Procurement Regulations Contradict The Court's Conclusion That The Heads Of Contracting Agencies May Disregard The Final Decisions Of Their Contract Appeal Boards.

In *Vitarelli v. Seaton*, 359 U.S. 535 (1959), this Court condemned administrative transgressions by

agency heads upon rights which they had granted through the promulgation of departmental regulations. By the decision below, such administrative transgressions are to be condoned. The Court of Claims has held, in this case, that the head of a contracting agency may disavow the final decision rendered by his cognizant contract appeal board. Governing procurement regulations do not allow such a result.²⁰

In the case of the Armed Services Board of Contract Appeals and the General Services Administration Board of Contract Appeals, to which the court referred to in its opinion (App. A, *infra*, p. A-11), the regulations governing the adjudicatory functions of those bodies vest them with authority to decide disputes clause appeals as "fully and finally" as might each agency head, 32 C.F.R. §30.1 (1970); 41 C.F.R. §5.60.101 (1970); and such decisions shall "constitute decisions of the Head of the Department as referenced in the Disputes clause standard in all Government contracts." 32 C.F.R. §1.314(g) (1970).²¹

²⁰ We should point out that in the present case no decision of a contract appeal board was involved. The final decision in this matter was by the AEC itself—a point to which the court's majority gave only scant attention. Nevertheless, discussion of the contract appeal boards is made necessary because of the broadness of the court's holding.

²¹ While the Federal Procurement Regulations do not contain a like worded regulation, they do make clear that the GSBGA speaks with finality for the Administrator in all situations save those where he has specifically reserved the right to decide personally. 41 C.F.R. §5-60.101(b) and §5-50.220(b) (1970).

Not only do these regulations oppose the court in its view that agency head and agency board are not one and the same insofar as disputes decisions are concerned, but, beyond that, they compel rejection of the idea that an agency head is free to pick and choose those decisions he will honor and those he will not. Where an agency head has, by regulation, delegated final decision making authority in contract matters to another, and, has, in like manner, announced that such final decision shall also be his own, then he is no more free to disregard that commitment than the department head in *Vitarelli v. Seaton, supra*.

The fact that the *Vitarelli* case involved procedural rights whereas this case deals with contract rights is of no consequence. In either case the actions taken by an executive agency must be judged by its word. And so it would follow that even if the Court of Claims was correct in holding that a contracting agency had the potential right to avail itself of the benefit of judicial review under the Wunderlich Act (a point we do not at all agree with) that right would not be open to it when it has promised through regulation, and by contract, to make the decision of its contract appeal board its own final decision.

4. The Issue In This Case Has Not Been Decided By This Court Nor Has This Court Otherwise Spoken Plainly On The Issue

A last point we make concerns the statement by the court below that this Court, through language in its

opinion in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966), recognized the Government's right to judicial review under the Wunderlich Act.²²

The sufficient answer to this position by the Court of Claims is that the *Utah* case did not involve the far-reaching question presented here. That case dealt with a wholly unrelated issue and the statement there made by this Court was dicta. For the Court of Claims to rely on such authority is only to underscore the weakness of its conclusion.

But if answers on broad reaching questions are to find their support in dicta—as the Court of Claims seems to think—then we would point out that in *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966), (a case argued and decided on the same dates as *Utah*), this Court used language which recognized that the right to appeal adverse administrative action under the disputes provision was truly only a contractor's right. Speaking on the point of what a reviewing court should do when an

²² The language in question reads as follows:

In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. * * * 384 U.S. at


administrative record is defective or shows prejudicial error, this Court said:

... there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for *the contractor*.... (emphasis added) 384 U.S. at 428

Clearly, by the above language, this Court recognized that appeals from the administrative machinery were contractor appeals.

CONCLUSION

This Court should review this case because the undermining of the Governmental "disputes" process and the potential for conflict between federal agencies, which the decision below makes possible, is a matter of substantial public importance and concern. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

In the United States Court of Claims

No. 104-67

(Decided November 30, 1970)

S & E CONTRACTORS, INC. v. THE UNITED STATES

Geoffrey Creyke, Jr., attorney of record for plaintiff. *John P. Wiese, Hudson and Creyke*, and *Locke, Parnell, Boren, Laney & Neeley*, of counsel.

James F. Merow, with whom was Assistant Attorney General *William D. Ruckelshaus*, for defendant. *Edward M. Jerum*, and *Vasil S. Vasiloff*, General Accounting Office, of counsel.

Robert F. Keller, Assistant Comptroller General of the United States, filed a brief for the General Accounting Office as amicus curiae. *Paul G. Dembling*, General Counsel, General Accounting Office, and *Vasil S. Vasiloff*, attorney, General Accounting Office, were with him on the brief.

Before COWEN, Chief Judge, LARAMORE, DURFER, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ON DEFENDANT'S REQUEST FOR REVIEW OF THE COMMISSIONER'S RECOMMENDED OPINION

NICHOLS, Judge; delivered the opinion of the court:

This is a contract case before us on defendant's request for review of our commissioner's recommended opinion. Stripped of subordinate and extraneous issues, the central question presented is whether the "Wunderlich" Act, 41 U.S.C. §§ 321-

22 (1964) (hereinafter referred to as the Act), affords the Government a right to obtain judicial review—coextensive with that of the contractor—of decisions of administrative tribunals unfavorable to it, on contract claims made in the course of the standard “disputes” procedure under the Wunderlich Act.

On August 4, 1961, plaintiff S & E Contractors, Inc. contracted with the Atomic Energy Commission (AEC) to build a testing facility at the National Reactor Test Station in Idaho. Performance of this contract generated numerous claims which the contractor properly filed with the contracting officer; those decided adversely to the contractor were seasonably appealed to the AEC. Since at this time the AEC did not have a contract appeals board to represent it, the contractor, under the AEC's then current procedures, was referred to a hearing examiner specially appointed to hear grievances and render findings of fact. Consequently, eight of plaintiff's claims were sustained by the hearing examiner and remanded to the contracting officer for negotiation and settlement on damage questions. Contrary to this directive, the contracting officer petitioned the AEC to review the hearing examiner's findings as to these eight claims. His petition was accepted and the AEC's review resulted in an affirmation of the hearing examiner's findings on seven of the eight claims. (The Government explains that the AEC did not actually affirm on these seven claims, but rather it merely declined to exercise its certiorari-like discretion to rehear them. This procedural clarification is of no real importance to our analysis, however, because the Government conceded at oral argument that the AEC's refusal to review these claims was itself sufficient to give the hearing examiner's findings administrative finality).

Again the matter was remanded to the contracting officer for final settlement. This time, however, settlement discussions were interrupted and finally terminated by the intervention of the General Accounting Office (GAO). Our commissioner found that an AEC certifying officer requested advice from the GAO with regard to the certification of a voucher for the making of payment on one of the successful claims. No mention was made nor was any advice solicited

concerning paying out on the remaining claims. Despite the narrowness of this request, the GAO advised the AEC in decision No. B-153841 (46 Comp. Gen. 441 (1966)) that payment on *any* of the disputed claims would be improper because the AEC's findings as to these claims were not supported by substantial evidence and were erroneous on matters of law. In view of this decision, the AEC informed plaintiff that plaintiff had "exhausted its administrative recourse to the Commission. * * * [and that] no action [would be taken by the Commission], in connection with the claims, inconsistent with the views expressed by the Comptroller General in * * * B-153841."

This information impelled plaintiff to bring suit in this court. Cross motions for summary judgment supported *only* by arguments and counter-arguments regarding the evidential substantiality and the legal correctness of the AEC's findings and conclusions were submitted to our trial commissioner. He, however, chose to disregard these arguments in favor of other theories. Essentially his opinion recommends that the AEC's failure to implement its own decision made under the contract's disputes provision (which he terms a repudiation) "must be regarded as a breach of that provision." Moreover, he suggests that the GAO intervention on substantiality and on legal grounds exceeded its authority and that therefore decision No. B-153481 "was too slender a reed * * * to support the Commission's repudiation of its own decision." The commissioner granted plaintiffs' motion for summary judgment, and rather than have the parties go back to the AEC for findings on quantum, he concluded that in view of the AEC's continuing refusal to pay plaintiff over a period of five years since its original decision, future relief there would be inadequate and unavailable. Hence, he recommends that plaintiffs' damages be fixed by this court under a Rule 131(c) proceeding. The points are ably made and the arguments are substantial, but we disagree.

The pervasive question running through this controversy is whether the Government has a right at all to seek judicial review based on Wunderlich Act standards where a tribunal of its own creation issues a contract disputes decision favorable to the contractor. Should this question be answered

affirmatively, we must also decide whether the Government's method of obtaining judicial relief in this case, simply by denying payment was proper.

Before tackling these provocative questions, we think it appropriate to define clearly the perimeters of our analysis. The factual background indicates that the Comptroller General effectively stopped payment of the claims. The Government, however, as represented by the Justice Department, which alone speaks for it in court, says that plaintiff would have been victorious by default in this court at the outset had Justice not decided to defend this suit. Specifically, it argues that this decision to defend was not prompted by any sort of requirement to give mandatory defense to opinions of the Comptroller General, but rather it was the uninfluenced product of the Justice Department's own thorough and independent review of the case. The Department considered the AEC's decision erroneous on matters of law and unsupported by substantial evidence in this case before us. Counsel for the Government therefore urges us to ignore the Comptroller's intervention as being the occasion but not the cause of the litigation and in no way itself an administrative decision having effect here or coming under our review.

We agree that the Comptroller's powers of decision and settlement, though great, may be assumed to lapse and fail at the Court House door. Therefore, it is not necessary for us to determine what decisions he might make or what finality they might have in cases not brought before us. When a Wunderlich Act case is pending here, the only question is how much finality attaches to the findings and holdings of the Board set up to execute the powers of the head of the agency in the premises. Really it makes no difference now whether the failure of defendant to pay out as the Board determined results, as here, from the Comptroller General's implied threat to charge the certifying officer's account, or from a change of heart in the agency itself, as was the case in *O. J. Langenfelder & Son, Inc. v. United States*, 169 Ct. Cl. 465, 341 F. 2d 600 (1965). We hold that in either event, a refusal by defendant to pay a Board award is not a breach of the disputes clause if the involved award is not supported by substantial evidence or otherwise is not entitled to finality under the Wunderlich Act. The reasons for this view follow.

The focus of our inquiry is the Wunderlich Act; the exact wording of the contract disputes clause in question has no bearing, at least as applied to the case before us. As we said in an earlier case, "it is the Wunderlich Act which is determinative. The minimal bounds of judicial review must be drawn from the terms, history, and policy of that Act, not from policies speculatively drawn from the contract clauses which are themselves governed by the statute." *C. J. Langenfelder & Son, Inc. v. United States*, 169 Ct. Cl. at 477 n. 7, 341 F. 2d at 607 n. 7 (1965).

Enacted in 1954 and unmodified thereafter, the Wunderlich Act reads as follows:

§ 321. LIMITATION ON PLEADING CONTRACT-PROVISIONS RELATING TO FINALITY; STANDARDS OF REVIEW

No provision of *any* contract entered into by the United States, relating to the finality or conclusiveness of *any* decision of the head of *any* department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in *any* suit now filed or to be filed as limiting judicial review of *any* such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent (sic) or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.* (Emphasis supplied for word any).

§ 322. CONTRACT-PROVISIONS MAKING DECISIONS FINAL ON QUESTIONS OF LAW

No Government contract shall contain a provision making final on a question of law the decision of *any* administrative official, representative, or board. (Emphasis supplied).

Strictly read the Act favors neither Government nor contractor: judicial review to whatever extent prescribed, seems extended equally and under like conditions to both contracting parties. The legislative history, albeit not explicitly, in general supports this construction. Both the House of Representatives and the Senate held full hearings on various bills introduced to undo the Supreme Court's de-

cisions in *United States v. Wunderlich*, 342 U.S. 98 (1951); and *United States v. Moorman*, 338 U.S. 457 (1950), making administrative disputes clause decisions final in the absence of fraud. (*Hearings on H.R. 1839, S. 24, H.R. 3634 and H.R. 6946. Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 82d Cong. 1st and 2d Sess., ser. 12 (1953-54)), (hereinafter referred to as the House Hearings); *Hearings on S. 2487 Before the Senate Subcomm. of the Comm. on the Judiciary*, 82d Cong., 2d Sess. (1952), (hereinafter referred to as the Senate Hearings). Spokesmen representing public and private interests presented contrasting views on the proposed legislation and the compass of its judicial review privileges. A sampling of their statements follows:

And of course, the [Supreme Court's *Wunderlich*] rule works *both* ways. A deciding administrative official can make decisions adverse to the Government as well as to contractors, in which event an improper decision results in a burden, an improper burden, to the taxpayers * * *. The experience of the General Accounting Office has been that this is not an infrequent situation. * * *

* * *. The enactment of such a [curative] bill would preclude administrative officers from making final decisions in contract matters on questions of law, but would leave such final decisions for determination by the General Accounting Office and the courts.

On the other hand, it would permit them to make determinations on questions of fact which would have final effect if the decisions were not found by the General Accounting Office or the courts to be fraudulent, arbitrary, capricious, et cetera. Such a law would not only protect a contractor from fraudulent, arbitrary or capricious action by giving him, in addition to resort to the courts, a further administrative remedy before the General Accounting Office, a time saving and less expensive proceeding, but it also would provide a protection, through the General Accounting Office, against decisions adverse to the interests of the United States. Certainly the rights of contractors and the Government to review or appeal should be *cocextensive*.

Now, we feel, * * *, that this is a two-sided proposition. The interests of the contractors are clearly

and undoubtedly involved. But likewise involved are the interests of the Government. I mean the *Government as a whole*, not just the Government as represented by one department or by one contracting officer.

Senate hearings, *supra*, at 9, 11, and 12, remarks of Frank L. Yates, Assistant Comptroller General of the United States. (Emphasis supplied).

* * * The position of the * * * [Associated General Contractors of America] is: We believe that *any* decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of *both* the contracting parties, and supported by the evidence upon which such decision was based. (Senate Hearings, *supra*, at 29, remarks of John C. Hayes, counsel for the Associated General Contractors of America). (Emphasis supplied).

* * * The essence of the legislative proposal now before this committee is that the contractor is to be given three reviews, that is one before a contracting officer, a second before the head of the department concerned, and a third before the Court of Claims, while the Government has but one [before the contracting officer]. Senate Hearings, *supra*, at 16, remarks of Bonnell Phillips, attorney Department of Justice. (This criticism was directed at the original proposal, not the draft subsequently enacted into law).

Specific citations to further testimony on this subject are as follows: Senate Hearings at 83-84, remarks of Gardiner Johnson, attorney at law; House Hearings at 4, remarks of Elwyn L. Simmons, President, J. L. Simmons Co., Contractors; *Id.* at 12, statement of Harry D. Ruddiman representing certain contractors; *Id.* at 19-20, remarks and letter of Alan Johnstone, attorney; *Id.* at 32-34, statement of the Honorable Edwin E. Willis (Representative, Louisiana) sponsor of H.R. 6946; *Id.* at 38-39, remarks of E. L. Fisher, General Counsel, General Accounting Office; *Id.* at 48, remarks of U. Bonnell Phillips, Assistant to the Assistant Attorney General, Civil Division, Department of Justice; *Id.* at 59, remarks of J. H. Macomber, Jr., Associate General Counsel,

General Services Administration; *Id.* at 109-11, remarks of Franklin M. Schultz; *Id.* at 140, letter of Lindsay C. Warren, Comptroller General of the United States; *Id.* at 138-139, letter of William P. Rogers, Deputy Attorney General of the United States; 99th Cong. Rec. 4573 (1953), remarks of Senator McCarran.

Plaintiff concedes that the recorded question and answer dialogue of the House and Senate Hearings "show Congressional awareness and intent that an administrative resolution of a contract dispute be amenable to review by both contracting parties", but it denies nevertheless "that the reviewing authority to be vested in the Government was to be anything other than the review function that had, in previous times, been exercised by the General Accounting Office." Simply, plaintiffs' "basic position" is that "under the Wunderlich Act, Congress contemplated that the GAO *alone* would be vested with the *limited* authority [over cases of fraud and gross error] to speak for the Government in respect to matters involving contract payment decisions." (Emphasis supplied). Contrarily, the Government argues that the qualified brand of judicial review afforded by the Wunderlich Act was intended² to be equally available to both Government and contractor.

Although it has been accurately observed that the Act's legislative history "has something for everyone" (Kipps, *The Right of the Government to Have Judicial Review of a Board of Contract Appeals Decision Made Under the Disputes Clause*, 2 Pub. Contract L. J. 286, 295 (1969)), we are convinced that Congress through the Hearings received a presentation emphasizing more the need for courts of competent jurisdiction to be open to both parties. The committee reports resulting from these Hearings reflect adoption of this position. The Senate Report accompanying S. 94 (S. Rep. No. 82, 83d Cong., 1st Sess. (1953)), which reflects the Wunderlich Act as passed, subject to modification to clarify the Comptroller General's status and other matters, makes the following observation:

It must also be borne in mind that to the same extent this decision [Wunderlich] would operate to the disadvantage of the *aggrieved contractor*, it would also operate to the disadvantage of the Government in those

cases, as sometimes happens, when the contracting officer makes a decision detrimental to the *Government* interest in the claim.

S. 24 will have the effect of permitting review in [the General Accounting Office] or a court with respect to *any* decision of a contracting officer or head of an agency which is found to be fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by [reliable, probative,] and substantial evidence. In other words, in those instances where a contracting officer has made a mistaken decision, either wittingly or unwittingly, it will not be necessary for the *aggrieved party* to, in effect, charge him with being a fraud or a cheat in order to effect collection of what is rightfully due. (Emphasis supplied). [Bracketed language denotes corresponding language in S. 24 later deleted by pre-enactment amendment.]

Identical language to that quoted above can be found in Senate Report No. 1670, *supra*. Although the House Report (H.R. Rep. No. 1380, 83d Cong., 2nd Sess. (1954)) did not include similar language, it did make this statement:

After extensive hearings it has been concluded that it is neither to the interests of the *Government* nor to the interests of any of the industry groups that are engaged in the performance of Government contracts to repose in Government officials such unbridled power of finally determining either disputed questions of law or * * * fact arising under Government contracts, nor is the situation presently created by the Wunderlich decision consonant with the tradition that *everyone* should have his day in court and that contracts should be mutually enforceable. * * *. (Emphasis supplied).

Considering the plain language of the Act and the basic premises of equity surrounding its passage, we reaffirm our reasoning in *C. J. Langenfelder, supra*, and *Acme Process Co. v. United States*, 171 Ct. Cl. 251, 258-59, 347 F. 2d 538, 543-44 (1965), and hold that the Government has the right to the same extent as the contractor to seek judicial review of an unfavorable administrative decision on a contract claim.

Our commissioner ruled and plaintiff now argues that the AEC's "repudiation" of its own decision was a breach of the disputes clause thereby entitling the plaintiff to *automatic* summary judgment on appeal. We have already rejected

similar positions in *O. J. Langenfelder* and *Acme Process*, and for the reasons stated in those cases, plaintiffs' assertion must likewise fail. We recognize that these two cases tacitly condoned the Government's withholding technique—exercised to the fullest here—as a way of forcing suit in this court and obtaining “at the very least” judicial review on questions of law. The instant case, however, not only involves questions of law, but also questions of fact and those elusive abominations known as mixed questions of law and fact.

We do not perceive this to be a distinction substantial enough to cause different results. Neither the Act nor its history will sustain foreclosing the Government from judicial review on this basis. Divided into two sections, the Act precludes the attachment of finality to any administrative decision rendered on a question of law or issued as a result of fraud, caprice or arbitrariness or so grossly erroneous as to imply bad faith, or not supported by substantial evidence. The same equity which permits us to relieve the parties from legally erroneous decisions also dictates our intervention where factual determinations are fraught with any of the above deficiencies.

The Supreme Court's *United States v. Utah Constr. Co.*, 384 U.S. 394 (1966), anticipates our conclusion with approval. There the contractor under the disputes procedure brought two claims against the contracting agency, the Atomic Energy Commission. The “Pier Drilling” claim asked for an equitable adjustment of the contract price and a time extension under the contract's changed conditions clause. The second claim—denominated as the “Shield Window” claim—sought additional compensation and time for inadequate specifications and drawings supplied by the Government. Both claims alleged that the additional compensation was needed to balance losses incurred by the contractor consequent to Government-caused delays. The AEC's Contract Appeals Board made findings generally unfavorable to the contractor thus prompting suit in this court. We found the contractor's claims for delay damages to be breach of contract claims and as such ineligible for administrative consideration under the disputes procedure. We held, with one dissent, that the Board's findings on these claims were not final and that it was

appropriate for us to consider the factual circumstances *de novo*. The Supreme Court rejected this reasoning. The Court noticed that the Board's findings as to the causes of the contractor's delays were common to both the disputes claims for time extensions and the breach claims for damages. It held therefore that where a Board makes findings within the scope of its disputes authority, the presumed finality of these findings statutorily prescribed by the Wunderlich Act does not evaporate merely by changing the labels on the claims. Crucial to our case, however, is the concluding pronouncement made by the Court in *Utah* at 422:

In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the *factual* disputes resolved were clearly relevant to issues properly before it, and *both* parties had a full and fair opportunity to argue their version of the facts *and* an opportunity to seek court review of any adverse findings. * * * (Emphasis supplied).

Hence the Court recognized the Government's right to judicial review of administrative factual determinations not meeting Wunderlich standards.

The trial commissioner's theory presupposes an identity between the Boards which adjudicate "Disputes Clause" cases and the directing heads of the agencies which make the contracts. When the Boards have spoken, the agencies have spoken, he thinks, and if they sustain the contractor, there is no dispute and nothing for the judicial power to operate on. It is true the differentiation is imperfect in the AEC procedure under review here, where the AEC itself is the final arbiter. But even so, the hearing examiner had no management functions. Under the Armed Services and GSA contracts, which generate the largest number of contract disputes, the Boards operate independently of the procurement authorities. The Armed Services Procurement Regulation establishes the Armed Services Board of Contract Appeals and authorizes it to decide appeals under the Disputes Clause of the contract, "as fully and finally as might each Secretary." 32 CFR § 30.1 (1962). The Federal Procurement Regulations contain similar provisions for the General Services Administration Board of Contract Appeals. 41 CFR § 5-60.101

(1963). The Secretary of Defense and the Administrator of GSA reserve to themselves no power of review or ratification of Board decisions. If one of them tried to tell a Board what to do in a pending case, he would commit a reprehensible *ex parte* approach. *Camero v. United States*, 179 Ct. Cl. 520, 375 F.2d 777 (1967).

We think the Wunderlich Act and the Supreme Court decisions interpreting it, in attributing finality to the extent they do to decisions of these Boards, necessarily imply an expectation that the Boards, while in the nature of things not as independent as Article III courts, will enjoy a degree of independence approaching and comparable to that of the various independent quasi-judicial and regulatory boards and commissions which, too, can make binding fact findings. *E.g.* National Labor Relations Board, 29 U.S.C. § 153 (1947); Securities Exchange Commission, 15 U.S.C. § 78d (1934); Federal Communications Commission, 47 U.S.C. § 151 (1934); Civil Aeronautics Board, 49 U.S.C. § 1321, (1958); Interstate Commerce Commission, 49 U.S.C. § 11 (1935). Having achieved this, it would be inconsistent and unfair for the law to turn around and pretend that the Board and the Secretary were the same. The Supreme Court characterized a disputes clause as an agreement "for the settlement of disputes in an arbitral manner", in the *Wunderlich* case, *supra*, 342 U.S. at 100. Appeals Boards of course, like the rest of us, sometimes err, but we see scant reason to believe they think of themselves as closer to one party than the other. To do so would demean the high standards they are sworn to as members of the bar. The Armed Services Board must consist of qualified attorneys admitted to the bar. 32 CFR § 30.1. The GSA Board includes at least three lawyers of whom each panel must include one or more. 41 CFR § 5-60.102. These requirements imply not only standards of education and training but also standards of ethics. From lawyer members, we believe, the public has a right to expect conformity to Canon 13 of the Canons of Judicial Ethics when they are acting in what the Supreme Court *quot supra*, calls a "judicial capacity." Canons 17, 24 and 29 also have special application to lawyer members of Contract Appeals Boards.

We think, in the existing circumstances, a Board power to extinguish a case or controversy merely by agreeing with the contractor is inconsistent with true independence. If, *e.g.*, the Secretary of Defense has established a Board that binds him as fully as he could bind himself, even as to legal conclusions and even in case of an arbitrary or capricious Board decision, he has created a Frankenstein monster. The temptation either to appoint persons to the Board who would be subservient to management wishes, or to make improper *ex parte* approaches, would be near to impossible to resist. Within the four walls of an executive establishment, the real independence of a Board would be suspect, the facts as to this would be difficult to come by, and contractors could never be sure they were getting from disputes clause procedures what they had contracted for. On the other hand, if the Secretary has the right to seek review within Wunderlich Act limitations, there is a safety valve and Boards can call cases as they see them without so much pressure building up. It would seem therefore, that even an egomaniac Board member would not desire the powers it is asserted on his behalf he possesses. Most of us have enjoyed the blessed relief of saying: "If you don't like my decision, the courts are open!"

In the administration of revenue laws, the differentiation between administration and adjudication is often not spelled out. The result is the rule of selecting among possible interpretations of law, the one that appears likely to raise the most tax. This rule has a name, the "Protect the Revenue" principle, under which it is heresy to abandon an arguable non-frivolous line of legal reasoning on the mere ground that another line, generating less revenue, appears to be right. Abandonment of the most favorable line to the Government would normally not be reviewed by a court, and would be final, while insistence on it produces judicial review, and this is the controlling reason why the administrator-adjudicator is apt to prefer the latter. From these observed facts it seems clear that decisions of a truly impartial and independent tribunal should always be equally reviewable, for whomsoever it decides. Breach of this principle is a prime cause of slanted decisions.

It is true, as we have already noted, that the AEC had not delegated its disputes clause powers to an independent Board. In this, however, the situation was somewhat unusual. We think we are justified in analyzing the position of the congress and the Supreme Court in light of their knowledge that delegation to an independent Board was then common and doubtless would remain so. Since the Wunderlich Act, the head of an agency would appear to be acting in a judicial capacity when he reserves to himself the adjudication of a claim under disputes clause procedure. He has for the nonce set his managerial responsibilities aside and put on another hat. Otherwise he would not be entitled to claim Wunderlich Act finality for his decision against a contractor's attack. The employment, as in this case, of a hearing examiner facilitates this differentiation of roles, and makes it more than a sham: Despite the emphasis of one of our dissenters on the absence of an independent Board in this case to execute the powers here involved, no reason is offered why legal consequences should flow from the distinction, and it would appear there are none. If we held that the AEC's action obliterated the dispute, we would have to hold that the decision of a Board it created would do the same.

We are assured on behalf of defendant that the GAO has in the past but sparingly tripped up the implementation of a Board decision favorable to a contractor, by means of threatening to charge a certifying officer's account, or otherwise. We are asked to infer it will exercise like self-restraint in the future. If so, the effect of our decision will not be to encumber further the already deplorably slow and rocky road to the final adjudication of Government contract disputes under the Wunderlich Act. If not, this would be for the further attention of Congress rather than warranting us in frustrating its evident purpose as to the full mutual availability of judicial review under the statutory standards. As long as procedures remain as they are, there is need for special diligence on the part of all concerned to keep cases moving along and to avoid multiplication of needless technical maneuvers.

In view of the foregoing, we remand the case to the commissioner for his consideration and report on the various claims under Wunderlich Act standards.

SKELTON, *Judge*, dissenting:

This court should not consider nor act on the alleged "appeal" filed by the Attorney General in this case for the reasons set forth below.

There is no Controversy Between the Plaintiff and the Atomic Energy Commission on the Facts or the Law in This Case

It is elementary that a court will not consider a case unless there is a controversy between the parties on the facts or on the law, or both. No such controversy exists here. The contract was made between the plaintiff and the Atomic Energy Commission (AEC). They included the standard "disputes" clause in the agreement which established the procedure for presenting, considering, appealing, and settling claims and disputes. During the performance of the contract, disputes did occur and plaintiff presented the claims involved here to the contracting officer, who rejected them. The plaintiff duly appealed to the AEC, who referred the claims to an examiner. The examiner heard the evidence and handed down his decision. The contracting officer appealed from the examiner's decision to the AEC, who modified the examiner's decision and eventually issued its own decision and opinion. All of this was done in strict accordance with the disputes clause and the agreement of the parties. The plaintiff has accepted the decision of the AEC and is agreeable to the disposition of its claims in the manner set forth in such decision. Under these circumstances, one may logically ask the question, where is the controversy? Clearly there is none.

The only complaint the plaintiff has is the fact that it has not been paid and its claims have not been disposed of in accordance with the decision of the AEC to which it has agreed. In effect, the parties to the contract have settled their differences to the extent they are covered by the AEC decision.¹ In a sense, the situation of the parties here could be likened to that of litigants whose disagreements have become a stated account. Of course, this court has jurisdiction to entertain plaintiff's claim because it has not been paid as provided in the AEC decision.

¹ The AEC decision, for the most part, determined the liability of the government to the plaintiff, leaving the amount plaintiff is to receive to be determined later by the contracting officer, subject to plaintiff's right to appeal as provided in the disputes clause.

On the other hand, the AEC has no claim, and, therefore, no right of appeal in this case. Actually, it has not asserted any claim nor any right of appeal here. As far as the record shows, it handed down a decision and was willing to carry it out and would have done so had it not been for the unjustified and completely unauthorized interference by the General Accounting Office (GAO), which will be discussed in more detail below, and the attempt by the Department of Justice to substitute its opinion for the decision of the AEC. In fact, were it not for the action of the GAO and the Department of Justice, the AEC would be willing to implement its decision at the present time, because there is nothing in the record that indicates it would not do so. As shown below, the Attorney General agrees that the AEC's decision has not been changed and the AEC would be willing to enforce it.

The AEC is the government as far as plaintiff's contract is concerned. It is the only party to the contract besides the plaintiff. The GAO did not sign the agreement and is not a party to this suit. The same is true with respect to the Department of Justice, who appears here only as the attorney for the AEC.² The AEC has no claim and asserts none.

The AEC Has not Reversed, Modified, Cancelled, Set Aside, or Changed Its Decision in Any Way.

Another compelling reason why we should not consider the appeal filed by the Department of Justice is the fact that the AEC never at any time reversed, modified, cancelled, set aside, or changed its final decision between the time it was issued on May 13, 1964, and the date this suit was filed on April 11, 1967, or thereafter.

It will be noted that the concluding paragraph of the final order of the AEC of May 13, 1964, provided:

The proceeding is remanded to the contracting officer with instructions to proceed to final settlement or decision in accordance with the decision of the hearing examiner dated June 26, 1963, as modified by our order of November 14, 1963, and by this decision.

² This will be discussed more fully below.

United States Atomic Energy Commission

/s/ Glenn T. Seborg

Chairman Glenn T. Seborg

/s/ John G. Palfrey

Commissioner John G. Palfrey

/s/ James T. Ramey

Commissioner James T. Ramey

/s/ Gerald F. Tape

Commissioner Gerald F. Tape

/s/ W. B. McCool

W. B. McCool, Secretary

This decision has never been reversed or changed in any way. The only act of the AEC after this decision was handed down was the writing of a letter dated March 27, 1967, by B. E. Hollingsworth, General Manager of the AEC, to the attorneys for the plaintiff, which stated:

The Atomic Energy Commission's view is that S&E Contractors, Inc. has exhausted its administrative recourse to the Commission. The Commission will take no action, in connection with the claims, inconsistent with the views expressed by the Comptroller General in his opinion of December 5, 1966—B-153841.

Sincerely yours,

B. E. Hollingsworth
General Manager

This letter, although signed by the AEC's general manager, is not the official action of the AEC, but only the manager's opinion as to the view of the AEC. But even if it could be said to be the action of the AEC, it does not in any way reverse or modify the final decision of the AEC of May 13, 1964. It informs the plaintiff that it has exhausted its administrative recourse to the Commission. This is but another way of telling the plaintiff that the decision of the AEC is final and there is nothing more that plaintiff needs to do with the AEC. When the AEC said in the above letter

* Before the United States Atomic Energy Commission, In the matter of S. & E. Contractors, Inc. Under Contract No. AT (30-3) 790 Docket Nos. CA-161 and CA-162, Decision of May 13, 1964, pp. 14-15. For the sake of brevity, the complete decisions are not reproduced here.

* Exhibit A, page 8, plaintiff's petition.

that it would take no action in connection with the claims inconsistent with the GAO's opinion, it was simply saying that as far as it was concerned its decision of May 13, 1964, was final and it did not intend to do anything further with respect to it or the claims involved. Actually, it has not done anything further, and its decision of May 13, 1964, still stands.

As a matter of fact, the Attorney General has agreed that the AEC has not repudiated its decision and will promptly proceed to implement it if this court so orders. This is shown in Defendant's Request for Review of the Commissioner's Recommended Opinion filed herein on November 21, 1969, where the following statement appears:

** * * To our knowledge to date [November 21, 1969] the Commission [AEC] has not repudiated the decisions involved in this matter and, in fact, plaintiff is relying on the purported finality of the decisions involved in this litigation. Should the Court rule adversely to our assertions on the merits of the finality issues, then the Commission will promptly proceed to implement the decisions. * * * [Id. at n. 4.] [Emphasis supplied.]*

This is an unqualified admission that the AEC decision has not been reversed or changed in any way, but is still in force. Under these circumstances, there is no claim of the AEC (the government) before the court in this case. A further admission by the Attorney General along this line is found on page 8 of Defendant's Reply to Plaintiff's Response to Defendant's Request for Review of the Commissioner's Recommended Opinion, where it is stated:

** * * If we are not successful in establishing that the disputes decisions lack finality, obviously upon a final judicial ruling to that effect, they would be promptly implemented. [Emphasis supplied.]*

There is no Need to Reach the Question of Whether an Executive Agency can appeal from a Board's Adverse Decision, as There is no such Agency Appeal nor a Board's Decision In this Case

The decision of the majority that an executive agency can appeal to this court from a Board's adverse decision is wide of the mark and must be considered as pure dicta, because

there is no appeal by an agency from a Board's decision in this case.

The majority approaches the problem as if the AEC, an executive agency, was appealing from an adverse decision of an independent or quasi-independent Board. That is not the situation at all. In fact, no Board of any kind is involved. At the time this case arose, the AEC did not have a Board to hear appeals under the disputes clause. When the plaintiff appealed from the decision of the contracting officer, he appealed directly to the AEC. Since the AEC did not have an appeals board, it referred the appeal to a hearing examiner, who heard the case and rendered a decision on June 26, 1963. The contracting officer appealed to the AEC from this decision and the AEC modified it somewhat in its decision of November 14, 1963. The contracting officer was still not satisfied and asked for a rehearing. The AEC granted the rehearing and again modified the decision by its final decision of May 13, 1964. So, in this case, we do not have a board decision at all, but on the other hand we have not only one decision but two decisions of the AEC itself, both of which were rendered after the examiner had handed down his decision. Under these facts, it is erroneous to hold that there is an appeal by the AEC, the executive agency involved, from an adverse Board decision.

It is true that the majority opinion recognizes that the decision in this case was made by the AEC itself and not by a Board. But after acknowledging this fact, it is put aside and is ignored as far as the ultimate decision is concerned. Many pages of the opinion are devoted to a discussion of the independence, honesty and quasi-judicial character of administrative Boards, and why the "government" should be allowed to appeal from their adverse decisions (without saying who is the government or who in the government can appeal (through the Attorney General as attorney and spokesman)). The following excerpts from the opinion clearly indicate that it is based on the erroneous premise that the appeal in this case is by an executive agency from an adverse decision of a Board:

* * * [T]he central question presented is whether the Wunderlich Act * * * affords the Government a right

to obtain judicial review * * * of decisions of *administrative tribunals* unfavorable to it * * *. [Emphasis supplied.]

The pervasive question running through this controversy is whether the Government has a right at all to seek judicial review based on Wunderlich Act standards where a *tribunal of its own creation* issues a contract disputes decision favorable to the contractor.* [Emphasis supplied.]

When a Wunderlich Act case is pending here, the only question is how much finality attaches to the findings and holdings of the *Board set up to execute the powers of the head of the agency in the premises*. [Emphasis supplied.]

Really it makes no difference now whether the failure of defendant to pay out *as the Board determined* * * *. [Emphasis supplied.]

We hold that * * * a refusal by defendant to pay a *Board award* is not a breach of a disputes clause if * * *. [Emphasis supplied.]

The majority opinion then discusses Armed Services and GSA *Board* and their independence from review by the Secretary and Administrator, respectively (as if that were the situation here), saying:

Under the Armed Services and GSA contracts * * * the *Boards* operate independently of the procurement authorities. * * *. The Secretary of Defense and the administrator of GSA reserve to themselves no power of review or ratification of *Board decisions*. [Emphasis supplied.]

We think the Wunderlich Act and the Supreme Court decisions interpreting it, in attributing finality to the extent they do to decisions of these *Boards*, necessarily imply an expectation that the *Boards* * * * will enjoy a degree of independence approaching and comparable to that of the various quasi-judicial boards and commissions in the Executive Branch, *which, too, can make binding fact findings. e.g., National Labor Relations Board [etc.]*. * * * *Having achieved this, it would be inconsistent and unfair for the law to turn around and pretend that the Board and the Secretary are the same*. [Emphasis supplied.]

* I interpret the words "administrative tribunals" and "a tribunal of its own creation" to mean and refer to Boards and not to the executive agency itself.

We think, in the existing circumstances, a *Board* power to extinguish a case or controversy by agreeing with the contractor is inconsistent with true independence. If, e.g., the Secretary of Defense has established a *Board* that binds him as fully as he could bind himself, even as to legal conclusions and even in case of an arbitrary or capricious *Board* decision, he has created a Frankenstein monster. * * * Within the four walls of an executive establishment, *the real independence of a Board would be suspect* * * *. [Emphasis supplied.]

* * * On the other hand, if the Secretary has the right to seek review within Wunderlich Act limitations, there is a safety valve and *Boards* can call cases as they see them without so much pressure building up.* [Emphasis supplied.]

The real basis of the majority opinion is shown by the following statement:

From these observed facts it seems clear that decisions of a *truly impartial and independent tribunal* should always be equally reviewable, for whomsoever it decides. [Emphasis supplied.]

A reading of the above excerpts from the majority opinion makes it inescapably plain and clear that the opinion is based on the erroneous belief that in this case we have an appeal by an executive agency from an adverse decision of an independent tribunal or Board. These are just simply not the facts. It appears that the majority has attempted to decide a question that is not involved here.

The majority cites the cases of *C. J. Langenfelder & Son, Inc. v. United States*, 169 Ct. Cl. 465, 341 F. 2d 600 (1965) and *Acme Process Co. v. United States*, 171 Ct. Cl. 251, 347 F. 2d 538 (1965) in support of its decision. These cases are distinguishable on the facts and issues from the case before us. In the *Acme* case there was a Board decision, but there is none here. In *Langenfelder* the agency repudiated its decision and attempted to reopen the hearing in order to reverse it, which is not the case here.

Should it appear that those cases in any way conflict with the opinions herein expressed, to that extent I would overrule them.

* No Secretary has sought review and there is no independent Board decision in our case.

The majority opinion is deficient in at least two vital respects, namely, (1) There is no appeal *by the AEC* (the concerned agency) from a Board decision nor from its own decision, and (2) There is no Board decision from which the AEC or any other agency could appeal.

The Attorney General has attempted to equate the decision of the AEC's hearing examiner to that of a Board. But this falls short of the mark. The agency's examiner and a Board are not the same. Their decisions are not the same. Furthermore, the AEC took the controversy out of the hands of its examiner and rendered two decisions itself thereafter. These are the decisions involved here.

The Action of the GAO Was Unauthorized and Beyond the Scope of Its Authority.

The GAO has an auditing function and is without authority to overturn the decision of a contracting officer, a Board or an executive agency, in contract cases involving the standard disputes clause, in the absence of fraud or overreaching. See *James Graham Mfg. Co. v. United States*, 91 F. Supp. 715 (N.D. Cal. S.D. 1950). Our able Trial Commissioner, Mastin G. White, found that there was no fraud or overreaching in this case. Therefore, when the GAO handed down a decision that plaintiff's claims were invalid and that the decision of the AEC favorable to the plaintiff on such claims was not supported by substantial evidence and was erroneous on matters of law, it purported to act as a reviewing court—a self-appointed court of claims—completely beyond its authority.

In addition to the foregoing, the action of the GAO on the claims involved in the case before us was completely unauthorized because such claims were never presented to it even for audit. The facts reveal that a certifying officer of the AEC asked the advice of the GAO with respect to the certification of a voucher in the sum of \$32,297.73 payable to the plaintiff under the contract. This voucher consisted of three items, namely \$22,280 withheld from plaintiff because it allegedly owed such amount to a supplier of aggregate, \$8,366.19 withheld because of the government's possible liability to another contractor, and \$1,651.54 withheld because of a possible liability by the plaintiff to another con-

tractor for telephone services. Our trial commissioner found that these amounts and this voucher did not include any proposed payment to the plaintiff on any of the seven claims that are under consideration in this case, namely, the "access", "concrete", "steam", "weather", "acceleration" and "backfill" claims. The Attorney General disputes this finding and says that at least one of the items in the voucher was related to delay damages for time extensions in the performance of the contract. The findings of the Commissioner are presumed to be correct, but even if he was mistaken in this respect, the action of the GAO was still unauthorized. It proceeded to review these seven claims in their entirety, the quantum of most of which had not (and has not) been determined, even though the claims had not been submitted to it for audit, and then issued an opinion regarding the invalidity of the AEC's entire decision, as aforesaid. It is clear that in taking this action, the GAO went out of its way to perform a review function which was not within its authority either by statute or by the terms of the contract.

The GAO now says by its amicus curiae brief filed herein that its action is not binding on the plaintiff and that its decision "did not, and could not, affect the ultimate substantive rights of the plaintiff" (Page 15), citing *Iran National Airlines Corp v. United States*, 175 Ct. Cl. 504, 508, 360 F. 2d 640 (1966) and *St. Louis B. & M. Ry. v. United States*, 268 U.S. 169, 174 (1925). This is of small consolation to the plaintiff after it has been "run over by the GAO steamroller" and forced into insolvency and out of business. His position is somewhat like that of an injured pedestrian who is told by a truck driver that he thought his truck had the right of way when it ran over him, and, anyway, he may recover from his injuries and he should just go away and forget it.

The Department of Justice takes more or less the same position, saying that the action taken by the GAO is "irrelevant", is not in issue, and is not being relied on. It is obvious that the Attorney General would find it very difficult if not impossible to sustain the acts of the GAO as being within the scope of its authority and binding upon the plaintiff.

I would not belabor the GAO issue were it not for the fact

that the majority opinion seems to give tacit approval to what the GAO did here by saying:

We are assured on behalf of defendant that the GAO has in the past but sparingly tripped up the implementation of a Board decision favorable to a contractor by means of threatening to charge a certifying officer's account, or otherwise. We are asked to infer it, will exercise like self-restraint in the future.

I am afraid that the majority is expressing a forlorn hope and is indulging in wishful thinking. This hope and thinking could turn to chagrin and dismay if the GAO, under the authority of the majority decision in this case, makes a regular practice of overturning administrative decisions favorable to contractors as it did here. In that case, the Frankenstein mentioned by the majority in another part of its opinion will have been created by us. The result will be disastrous to contractors and very hurtful to the government as well. I do not think we should approve, even by implication, what the GAO did here, but should flatly repudiate it.

The AEC Is The Government In This Case, and The Attorney General Is Without Authority To Revise, Modify or Overturn Its Decision.

The Attorney General claims to be "the government" in this case. He says on page 6 of Defendant's Reply to Plaintiff's Response to Defendant's Request For Review of The Commissioner's Recommended Opinion:

• • • In this Court, the Government is, for all intents and purposes, the Department of Justice, 28 U.S.C. §§ 516, 519 (1966 Supp.).

In this statement, and otherwise, he implies that he and his Department have the power and authority to review a decision of another executive agency and to overrule it and substitute his own opinion for it on questions of fact and of law, of mixed fact and law, policy, discretion, expediency, exigency, propriety and executive agency judgment. I do not agree. Such reasoning would indeed make his department a super reviewing agency without whose approval no other executive agency or department could do anything with finality. He cites 28 U.S.C. §§ 516, 519 (1966 Supp.) and

Federal Trade Commission v. Guignon, 390 F. 2d 323 (8th Cir. 1968) in support of this proposition. A reading of these authorities does not support his theory. The two cited statutes merely provide that when the United States or an agency or officer thereof is involved in litigation, he shall be the attorney and counsel in a representative capacity to conduct the litigation. In other words, he is supposed to act as any attorney would act in representing his client. These statutes in no way authorize him to review and overrule what another executive agency has already decided on matters peculiarly within its jurisdiction and substitute his own opinion and decision therefor.

The Federal Trade Commission case, *supra*, does not support the theory of the Attorney General. There the Federal Trade Commission sought to enforce subpoenas issued by it by using its own attorneys to make application in court for such enforcement. The Attorney General took the position that the Commission could not represent itself in court but must have the application for enforcement made by the Attorney General "at the request of the Commission". The court upheld the contention of the Attorney General. It is clear that the issue there was whether the Commission could use its own lawyers or must use the Attorney General to make the application. This was a matter of who was to appear in court as the attorney for the Commission—a question of representation—not one of substituting the Attorney General's opinion or decision for that of the Commission on facts, policy or discretion, or any other matter within the jurisdiction of the Commission. It is significant, too, that the court indicated that the Attorney General should be requested by the Commission to represent it in court. (In our case there is no showing that the AEC ever requested the Attorney General to try to overturn its decision in this court, nor to modify it in any way.)

This court held in *Campbell v. United States*, 19 Ct. Cl. 426, 429 (1884) that the authority of the Attorney General to conduct suits in the Court of Claims on behalf of the government "may fairly be held to include, at least, every act in the conduct of such suits, which an attorney at law, in a suit between individuals, might lawfully do." In other

words, his position and authority is that of an attorney representing his client. We need go no further than the opinion of the Attorney General himself to support this proposition. He said in 7 Op. Att'y Gen. 577 (1855):

The relation of the Attorney General to any one of the Executive Departments * * * is that of counsel to client, namely, to give advice as to the legal right, and instruct procedure, *if desired*, leaving all considerations of administrative exigency or expediency to the decision of the proper Department. [Emphasis supplied.] [*Id.* at 577].

The Attorney General himself has repeatedly ruled that he has no authority to review or overturn decisions of other executive agencies upon questions of fact, of mixed fact and law, policy, discretion, expediency or other matters peculiarly within the jurisdiction of such agencies. I quote only a few of these opinions as follows:

* * * It is not within the scope of my authority to reverse this decision of the [Civil Service] Commission or to require it to issue the certificate of reinstatement [of a discharged employee.]

No statute is found which authorizes the Attorney General to reverse or review this action of the Commission * * *. [20 Op. Att'y Gen. 270, 272 (1891).]

* * * The Attorney General has no control over the action of the head of the Department [Secretary of the Interior], nor could he with propriety express any judgment concerning the *disposition* of the matter * * * that being something wholly within the administrative sphere and direction of such head of Department. [17 Op. Att'y Gen. 332, 333 (1882).]

This substantially asks me to exercise appellate jurisdiction over a decision upon mixed questions of fact and law. This I am not empowered to do. [Directed to the Secretary of the Interior.] [20 Op. Att'y Gen. 711, 713 (1894).]

* * * I am not authorized to express any views upon a matter of propriety lying within your [Secretary of the Treasury] own executive judgment and discretion * * *. [25 Op. Att'y Gen. 93, 96 (1903).]

Finally, it is not within my province to construe the reasons affecting his administrative judgment and discretion, which might impel the head of a Department to take any action one way or the other in a matter pending before him for decision * * *. I am neither em-

powered nor required to pass upon the propriety of the exercise by the Secretary of the Interior of his official discretion. [25 Op. Att'y Gen. 524, 529 (1905).]

It appears * * * that I am not called upon to give an opinion upon a question of law now pending and undetermined in the Veteran's Administration but am asked to give an opinion upon a question which you have already considered and decided. It has been held by my predecessors that this Department possesses no jurisdiction under the law to revise a conclusion already reached * * *. (20 Op. Att'y Gen. 440). [38 Op. Att'y Gen. 149, 150 (1934).]

Mr. Bates says (10 Opin., 267): 'I have no power to investigate or decide on facts * * *'

* * * I am not at Liberty to submit * * * an official opinion * * * upon the questions that have been decided * * *. [20 Op. Att'y Gen. 440, 444, 445 (1892).]

Not only must the question arise in the administration of a department, but it must be still pending and undecided. A matter which has been considered and decided by a department is not a 'question' upon which the Attorney General renders an opinion. (20 Op. 440). As Attorney General Butler (3 Op. 39) said, in declining to render an opinion upon a question which had been decided by the department making the request: 'I cannot undertake to give an official opinion on the question proposed to me, without assuming that this office possesses a revisory jurisdiction not conferred upon it by law.' [39 Op. Att'y Gen. 67, 68 (1937).]

The last word of the Attorney General on this subject was expressed in his opinion of January 16, 1969, in which he said:

I understand the concern of GAO that its *review of contract appeals board decisions* is necessary to enable the Government to obtain judicial review of an adverse board decision. See 46 Comp. Gen. 441, 458 (1966). In my opinion, however, GAO review is not the only means to accomplish this purpose. *The contracting agency, acting through the Department of Justice as the Government's counsel in claims litigation, is also able to obtain such review on its own initiative.* * * *

* * * *The contracting agencies* should call to this Department's attention, on a continuing basis, *appeals board decisions* against the Government which they feel warrant litigation in accordance with the Wunderlich Act. *Thereupon*, * * * this Department, *as the attorneys for the Government*, will make an independent

appraisal as to whether the suit can properly be litigated under the Wunderlich Act. * * * [Emphasis supplied.] [42 Op. Att'y Gen. January 16 (1969) at 9, 10.]

The broad executive responsibility for contract administration encompasses the separate functions of adjudication and advocacy. The contracting agency acts through its Board of Contract Appeals as *impartial arbiter of disputes*. Other organs of the agency represent the interests of the Government before the Board in the role of advocate. The advocacy aspect of the overall agency responsibility extends to determining *whether the agency* should seek review of an adverse board decision. [Emphasis supplied.] [42 Op. Att'y Gen. January 16 (1969) at n. 18.]

* * * GAO audit can check on agency performance, but *only the contracting and legal officials of the agency have the intimate familiarity with these cases necessary for timely determination of those board decisions* in which judicial review to protect the interests of the Government is warranted. [Emphasis supplied.] [42 Op. Att'y Gen. January 16 (1969) at 11.]

Five principles stand out in the foregoing opinion. These are: (1) There must be a Board decision; (2) The Board must be an autonomous and "impartial arbiter of disputes;" (3) the Board's decision must be adverse to the interests of the government; (4) the contracting agency "on its own initiative" must seek judicial review of the Board decision; and (5) the Department of Justice acts as the attorney for the contracting agency. None of these requirements have been met in this case. Certainly, the opinion does not purport to approve an independent action by the Department of Justice on its own motion to judicially overturn the decision of an agency itself, which is the case here. Nor does it approve the proposition that an agency can appeal from its own decision. The opinion speaks only of an agency appeal from the decision of a *Board* that has acted as an "impartial arbiter" of a dispute.

In citing the 1969 opinion of the Attorney General above, I do not mean to imply that I agree with the statement therein contained that a contracting agency can obtain judicial review of an adverse Board decision. That question has not been expressly decided by this or any other court. It is

not involved here. We should decide that problem when it is presented to us in a proper case.

The long-continued practice and custom of an executive agency in administering and performing its functions and duties and in interpreting applicable statutes, is entitled to great weight in determining its powers and authority. See *United States v. Midwest Oil Co.*, 236 U.S. 450, 472-3 (1915); *Udall v. Tallman*, 380 U.S. 1, 17 (1965); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); *Power Reactor Development Co. v. Electricians*, 367 U.S. 396, 408 (1961); *Crawford v. United States*, 179 Ct. Cl. 128, 142, 376 F. 2d 266 (1967), *cert. denied*, 389 U.S. 1041 (1968). This rule is applicable here to determine the authority, or lack of it, of the Department of Justice.

It is clear from these statements of the Attorney General himself that he does not have any review or revisory power over decisions made by other agencies on matters peculiarly within their jurisdictions. He cannot substitute his own opinion for the decision of another agency, especially on questions of fact, mixed fact and law, policy, expediency, propriety, discretion, exigency or executive judgment. The above cited statutes did not enlarge his powers and authority in this regard.

The majority stresses the point that the Department's efforts here are "the uninfluenced product of the Justice Department's own thorough and independent review of the case." [Emphasis supplied.] It says further that "the Department considered the AEC's decision erroneous on matters of law and unsupported by substantial evidence * * *." I find no authority vested in the Department of Justice to review the AEC decision in any manner different from a review by any other lawyer of his client's case to familiarize himself with the issues involved in preparation for a court trial. Although not cited by the Attorney General, and apparently not relied on by him, a word should be said about Executive Order No. 6166 of June 10, 1933, issued by the President as authorized by Congress pertaining to the reorganization of executive agencies, in which broad powers were given to the Department of Justice to handle cases in

court for governmental agencies.' Section 5 of the order provides in effect that such Department shall represent all government agencies and officers in all courts of the United States. It further provides that the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense in any case referred to it to handle in court, "*now exercised by any agency or officer*", is transferred to the Department of Justice." I do not think this provision gave the Department the authority to review, revise nullify, or reverse the administrative decision of another executive agency such as that before us, nor to substitute its opinion therefor. Actually, it did not give the Department any more authority in this regard than it already had. It will be noted that it was only given the function of decision *now exercised by any agency or officer*. At the time of the Order (1933) no agency had ever exercised any right of appeal to a court from an adverse decision of an administrative Board or from its own decision. As applied to our case, assuming the application of the Order as of the present time I have already shown that the question of whether an agency can appeal from an adverse decision of a Board is not before us and should not be decided. As to whether or not an agency can appeal from its own decision that is adverse to the government, my view is that it cannot do so. To allow such an appeal would be to sanction an absurd and ridiculous proceeding. In the first place, there is no necessity for it. If the agency thinks the government should win, it has the complete decision making power at the agency level. Such an appeal would be as ludicrous as an appeal by this court to the Supreme Court asking that one of our decisions be reversed. I cannot imagine an executive agency of the United States putting itself in such a foolish position. Since the agency is without power to engage in such an appeal, the Department of Justice is likewise without authority to do so by the very terms of the Executive Order.

Furthermore, the Department of Justice is given no decision making authority by the Order in a case until it is

* Executive Order No. 6166 is reproduced in the footnote of Title 5, U.S.C.A., § 901 and also in Title 5, U.S.C. following omitted § 182, pp. 157-161 (1964 ed).

referred to the Department. Obviously such referral will not be made until the case is already filed in Court. Consequently, the words "or to appeal" refer to an appeal from the court decision and not to the administrative decision of the agency nor to a decision of a Board at the agency level. In short, the Order simply made the Attorney General the attorney for all agencies and officers of the government in cases in court and gave him the same powers to handle court cases that other attorneys have in similar circumstances in representing their clients. The Order did not empower the Attorney General to revise, modify or overturn an agency decision as he is attempting to do here. This is further shown by another paragraph of Section 5 of the Order as follows:

Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

The procedure being followed by the Attorney General here not only affects the function of the agency at the agency level, but actually nullifies it. If the Attorney General is to have the last word in contract appeals cases and is to have a veto power over agency and Board decisions, we might as well do away with decisions of agencies and Boards altogether, and send all such appeals directly to the Attorney General for hearings and decisions, after appropriate contract changes.

I do not think Congress ever intended to confer upon the Attorney General the power he is asserting here when it passed the Wunderlich Act. His action, with the approval of the majority opinion, has tied the whole administrative process in contract cases into a very tight knot of red tape and delay, and it may take an Act of Congress to untie it, since this court has not seen fit to do so.

A Day in Court for the Parties

The Attorney General, in effect, urges that the parties here are entitled to their "day in court" on the finality issue and on the merits. At first blush, this is appealing to the American sense of justice and fair play. However, when it

is applied to the facts and procedures in this case, it loses its appeal. The plaintiff does not want a hearing in court. All he wants is the enforcement of the decision and to be relieved of inter-departmental squabbling over powers and duties. The AEC, the only other party to the suit, has had the questions involved in the case heard *four* times already by those authorized by the contract to hear them, namely, the contracting officer, the examiner and twice by the AEC itself, all of whom represented the government. The AEC has not asked for a court hearing on whether or not its decision is final nor on the merits, and, if it could speak out, it would no doubt oppose it. That only leaves the Attorney General, who is not a party and who appears in the case as an attorney. He wants a hearing in court to enable him to assert a theory contrary to the decision of his client, the AEC. His argument is unpersuasive.

The effect of the majority opinion is to allow the Attorney General *sua sponte* to appeal from the decision of another executive agency adverse to the government for the purpose of overturning it, and, by dicta, authorizes him to similarly appeal from an adverse Board decision for the same purpose. Such a procedure imposes an additional layer of bureaucratic red tape that contractors must overcome before they receive final decisions along the administrative trail on their claims under the disputes clause in government contracts. It easily adds from one to three years, and perhaps more, to the already extended period of time for processing a contractor's claim. Under such a system, how can a knowledgeable contractor afford to do business with the government?

Quantum and Breach of Contract

The trial commissioner held that the failure of the AEC to pay the plaintiff and carry out its decision for a period of over five years after it was rendered was a breach of contract. He also held that the administrative procedure was inadequate and unavailable and under the authority of *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966), we should proceed to hold a trial on the quantum due plaintiff on his claims. Judge Collins also held in his dissent that there was a breach of contract by the AEC, citing *United*

States v. Marietta Mfg. Co., 268 F. Supp. 176 (S.D. W. Va. 1967). While a breach of contract is strongly indicated, I feel that the AEC cannot be blamed for failure to pay the plaintiff because of the action of the GAO and especially because of its threat to charge any payment made to the certifying officer of the AEC. Therefore, I would not hold that the AEC breached the contract. Also, I feel that, although probably justified, the better policy would be not to hold the trial on quantum here but to remand the case to the AEC and its contracting officer for that purpose.

CONCLUSION

I would deny the motion of the Attorney General for summary judgment, and grant plaintiff's motion for summary judgment, and remand the case to the AEC and its contracting officer for the purpose of enforcing and carrying out the final decision of the AEC.

COWEN, *Chief Judge*, concurs in the foregoing dissenting opinion of Judge Skelton.

COLLINS, *Judge*, dissenting:

I concur in Judge Skelton's opinion except that I would hold that, in failing to pay its own award, the AEC breached its contract with S & E. Because of the broad impact of the court's opinion, however, I feel compelled to address myself to the issues as the court has framed them.

The court's decision in this case will, in one fell swoop, render the already troubled business of Government contracting hopelessly chaotic. I am convinced that today's decision is wholly undesirable and supportable only by a strained interpretation of legislative history.

The essence of the court's opinion is that the Wunderlich Act, 41 U.S.C. §§ 321-22 (1964), affords the Government the right to judicial review of decisions of its own agencies, rendered pursuant to the standard "disputes" clause in Government contracts, adverse to it. Support for this conclusion comes, according to the court, from the words of the act itself and from bits of legislative history which, in the court's words, "albeit not explicitly, in general supports * * * [the court's] construction." My own view of the act and its pre-enactment history leads me to the contrary conclusion.

Contrary to the court's opinion, I do not read the act as extending judicial review to both parties "equally and under like conditions." The clear and unambiguous language of the act reveals that, far from extending the right of judicial review to the Government, it merely serves to limit the contents and effect of the "disputes" clause, which has a history long antedating the act.

Furthermore, since a statute is merely the attempted verbalization of the legislative will, statutes must be read with one eye on the underlying legislative intent. In 1892, the Supreme Court, speaking through Mr. Justice Brewer, commented as follows:

* * * It is a familiar rule, that a thing may be within the letter, of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. * * *

* * * "The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed." * * *

Church of the Holy Trinity v. United States, 143 U.S. 457, 459-60 (1892), cited with approval in *Inter-City Truck Lines, Ltd. v. United States*, 187 Ct. Cl. 290, 295, 408 F. 2d 686, 688-89 (1969), *Select Tire Salvage Co. v. United States*, 181 Ct. Cl. 695, 703, 386 F. 2d 1008, 1012 (1967). More recently, the Supreme Court has said that:

* * * When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." * * * A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, "excepting as a different purpose is plainly shown." [Footnotes omitted, emphasis supplied.]

United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940).

For courts to interpret statutes in such a way as to extend, limit, modify, or alter in any way the manifest intent of the legislature amounts, in my view, to a clear usurpation of the legislative function. As I shall attempt to demonstrate, the act in question has but a single and limited purpose which does not at all support the court's conclusion in this case.

The Wunderlich Act (which, more appropriately, might be called the Anti-Wunderlich Act) was Congress' direct response to the Supreme Court's decision in *United States v. Wunderlich*, 342 U.S. 98 (1951). In that case, reversing this court, the Supreme Court held that a decision of an agency head (or the contract appeals board to which he has delegated authority) under the "disputes" clause¹ could not be overturned on judicial review "unless it was founded on fraud, alleged and proved." 342 U.S. at 100. The devastating effect of the *Wunderlich* decision was well described by Justice Douglas when he said, in dissent, that "[i]t makes a tyrant out of every contracting officer." 342 U.S. at 101.

The evil perceived by Justice Douglas and the other dissenters did not escape congressional attention, and several bills were introduced, in both houses, to remedy the evil. Each house held its own hearings on the matter. The Senate hearings, from which testimony is quoted by the court, were held in 1952. Witnesses at these hearings, representing both Government and industry, were understandably alarmed by the degree of finality which the Supreme Court's decision had accorded administrative decisions under the "disputes" clause.

The flavor of the witnesses' testimony regarding appeal from such decisions is, in many cases, ambiguous and, in no event, can be viewed as an endorsement of the position that the Government should be able to disavow and seek judicial

¹ The usual pre-Wunderlich Act "disputes" clause was as follows:

"ARTICLE 15. *Disputes*.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

review of adverse board decisions. On the contrary, if there is a discernible flavor to the Senate hearings, it is that only the contractor should have the benefit of judicial review.

For example, the testimony of Frank L. Yates, Assistant Comptroller General of the United States, quoted by the court, is to the effect that "the rights of contractors and the Government to review or appeal should be coextensive." *Hearings on S. 2487 Before the Senate Subcomm. of the Comm. on the Judiciary*, 82d Cong., 2d Sess. 11 (1952). At the same time, however, Mr. Yates testified as follows:

* * * Such a law [a modified version of S. 2487 offered by the GAO] not only would protect a contractor from fraudulent, arbitrary or capricious action by giving him, in addition to resort to the courts, a further administrative remedy before the General Accounting Office, a time saving and less expensive proceeding, but it would also provide a protection, through the General Accounting Office, against decisions adverse to the interests of the United States. * * * [Emphasis supplied.]

Id. The witness' careful reference to the right which each party would have to review by the GAO and his obvious failure to refer to a concomitant right on the part of the Government to have "resort to the courts" can only indicate that, in urging "coextensive" rights of review for both parties, Mr. Yates was referring to GAO, not judicial, review.

The court also quotes from the testimony of John C. Hayes, counsel for the Associated General Contractors of America, Inc. At one point Mr. Hayes stated, as the court quotes, that the position of his organization was that:

* * * any decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based.

Id. at 29. The court fails, however, to quote later testimony of this witness which adds a vital gloss to the quoted testimony:

In concluding, we respectfully urge that this committee draft legislation that will grant the United States Court of Claims, and the United States district courts

to the extent that they now exercise jurisdiction concurrent with the United States Court of Claims, jurisdiction to hear, determine, and enter judgment against the United States on any claim in which the contractor shall seek a review of a decision on a disputed question between the United States and such contractor, made by an officer, board, or other representative of the United States under any contract entered into with the United States. [Emphasis supplied.]

Id. at 30. Clearly, looking at his testimony in its entirety, Mr. Hayes was of the opinion that the Government's rights in contract disputes were adequately protected by the "disputes" clause, which reposes decision-making authority in the Government agencies, and that judicial review was needed only to protect the rights of contractors.

The House Committee report accompanying the final draft of the act as passed in 1954 states, unequivocally, that the purpose of the act—the only purpose—was "to overcome the effect of the Supreme Court decision in the case of *United States v. Wunderlich* [sic] (324 U.S. 98), rendered on November 26, 1951, under which the decisions of Government officers rendered pursuant to the standard disputes clauses in Government contracts are held to be final absent fraud on the part of such Government officers." H.R. REP. No. 1380, 83d Cong., 2d Sess. 17 (1954). Thus, the express legislative purpose underlying the act was to do no more than reopen the channels of judicial review of decisions of Government officials pursuant to the "disputes" clause to the extent they had been open prior to the *Wunderlich* decision. Prior to *Wunderlich*, the Government could obtain such review of board decisions adverse to it only in those rare situations when, for fraud or other such compelling reasons, the General Accounting Office could and did set aside a "disputes" clause decision in favor of a contractor.

Perhaps the strongest support for my conclusion that the Wunderlich Act was not intended to provide the Government with the right of judicial review of adverse board decisions lies in the fact that Congress explicitly refrained from granting the GAO any greater power under the act than it already possessed. The House hearings reflected more

than passing concern with that portion of a House bill² and the Senate bill, which gave the GAO, along with the courts, the power to review "disputes" clause decisions. The position of many of the opponents of this provision was well stated in a letter to the Chairman of the House Committee on the Judiciary from Mr. Roger Kent, general counsel of the Department of Defense:

To superimpose General Accounting Office review on existing disputes clause procedures would not only create a completely new review, it would, as a practical matter, eliminate the usefulness of the disputes clauses themselves by destroying the concept of finality and dividing the responsibility for determining the merits of any given appeal. Undoubtedly, this would generate protracted and expensive disagreements among Government agencies, the General Accounting Office and contractors representatives. This would defeat the aims of both the Government and its contractors by making it impossible to accomplish the very purposes of the disputes clause; i.e., the achievement of proper and expeditious performance of contracts.

Hearings on H.R. 1839, S. 24, H.R. 3634, and H.R. 6946 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 82d Cong., 1st and 2d Sess., ser. 12, at 132 (1953-54).

In the end, the opponents prevailed and the objectionable provision was dropped. More importantly, however, the report accompanying the bill in its final form was careful to explain that the bill would not alter in any way the jurisdiction of the GAO:

The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the

² One of the bills under consideration, sponsored by the GAO, was H.R. 1839, 83d Cong., 1st Sess. (1953):

"* * * That no provision of any contract entered into by the United States, relating to the finality or conclusiveness, in a dispute involving a question arising under such contract, of any decision of an administrative official, representative, or board, shall be pleaded as limiting judicial review of any such decision to cases in which fraud by such official, representative, or board is alleged; and any such provision shall be void with respect to any such decision which the General Accounting Office or a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. [Emphasis supplied.]

"Sec. 2. No Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative, or board."

course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.³

H.R. REP. No. 1380, 83d Cong., 2d Sess. 23 (1954). What, then, was the jurisdiction of the GAO before the adoption of the Wunderlich Act?

The Budget and Accounting Act of 1921, 31 U.S.C. §§ 71-134 (1964), conferred upon the GAO basic audit and settlement authority.⁴ As early as 1922, however, the Supreme Court made it perfectly clear that the GAO had "no power" to upset the decision of a contracting officer where the authority to render that decision had been given to the contracting officer by the terms of the contract. *United States v. Mason, & Hanger Co.*, 260 U.S. 323 (1922). Perhaps the most quoted language relating to the powers of the GAO in these matters is found in the district court's opinion in *James Graham Mfg. Co. v. United States*, 91 F. Supp. 715 (N.D. Cal. 1950):

The powers of the Comptroller General are extensive and broad. But he does not, *absent fraud or overreaching*, have authority to determine the propriety of con-

³ The report also states: "It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill." [Emphasis supplied.] H.R. REP. No. 1380, 83d Cong., 2d Sess. 23 (1954). As will be shown, however, this unfortunate statement resulted from a misunderstanding of the former practice of the GAO in reviewing board awards. "While the legislative history contains some conflicting statements, on balance it does indicate that Congress did not intend to set GAO up as an additional layer of administrative appeal for contractors on disputes clause questions." 42 Op. ATT'Y GEN. 33 (1969).

⁴ The relevant provisions of the act are as follows:

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." [31 U.S.C. § 71 (1964).]

"Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement." [31 U.S.C. § 74 (1964).]

"The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification." [31 U.S.C. § 82d (1964).]

tract payments when the contracts themselves vest the final power of determination in the contracting executive department. * * * [Footnote omitted, emphasis supplied.]

Id. at 716.*

Decisions of this court prior to passage of the act, likewise, leave no room for doubt that, except in cases where fraud or overreaching was involved, this court viewed as wholly without legal effect the action of the GAO in overturning a decision by a Government officer authorized by the contracting parties to be the deciding authority on disputes arising under the contract. *See, e.g., Bell Aircraft Corp. v. United States*, 120 Ct. Cl. 398, 100 F. Supp. 661 (1951), *aff'd*, 344 U.S. 860 (1952); *McShain Co. v. United States*, 83 Ct. Cl. 405 (1936); *Maryland Dredging & Contracting Co. v. United States*, 66 Ct. Cl. 627 (1929).

It thus becomes apparent that if the legislative intent underlying the Wunderlich Act is to be given proper effect, the jurisdiction of the GAO to overturn board decisions under the "disputes" clause must be restricted to those instances where such decisions are produced through fraud or overreaching. In this case, our commissioner found that "the record is wholly devoid of any indication that the administrative decisions favorable to the plaintiff were tainted by fraud or overreaching." In *Climatic Rainwear Co. v. United States*, 115 Ct. Cl. 520 (1950), this court held that, where the parties to a Government contract agree that a designated Government official is to determine factual disputes between the parties, "[t]he discharging of these functions could neither be delegated to nor usurped by anyone not authorized by the terms of the contract." *Id.* at 559. *See also New York Shipbuilding Corp. v. United States*, 180 Ct. Cl. 446, 385 F. 2d 427 (1967). While it is not clear, in this case, whether the AEC "delegated" authority to the GAO or the GAO "usurped" the AEC's authority under the "disputes" clause, it is clear that one of those two events must have occurred. For the foregoing reasons, I can only conclude, as did our commissioner in his excellent and well-reasoned report, that

* *See also Leeds & Northrop Co. v. United States*, 101 F. Supp. 999 (E.D. Pa. 1951); *Consolidated Vultee Aircraft Corp. v. United States*, 97 F. Supp. 948 (D. Del. 1951).

the GAO acted without authority in advising the AEC that none of the disputed claims was supported by substantial evidence, that all were erroneous on matters of law, and that payment on any of them would be improper.

In the present case, this court, by an act of judicial legislation, is doing what Congress specifically refused to do legislatively, i.e., the court is effectively conferring upon the GAO authority to review final administrative decisions under the "disputes" clause of Government contracts for the purpose of ascertaining whether such decisions are supported by substantial evidence and otherwise meet the criteria set out in the Wunderlich Act. Moreover, the court is conferring such authority without imposing upon the GAO any collateral requirement that it grant procedural due process to contractors in exercising the power of review. This is both unfair and exceedingly disadvantageous to persons who enter into contracts with the Government.

This brings me to a consideration of the court's holding that a refusal by the Government to pay a board award is not a breach of the "disputes" clause, *even though the refusal results "from a change of heart in the agency itself,"* if the involved award is not entitled to finality under the Wunderlich Act.* [Emphasis supplied.] To hold to the contrary, the court reasons, would violate the terms of the act.

As I have pointed out previously, the act had, and has, a very limited purpose—to overcome the effect of the *Wunderlich* decision. Since, at the time that decision was rendered, it would have been unprecedented for an agency to repudiate, or to seek judicial confirmation of, its own decision, I find it difficult to believe that Congress ever intended to confer this right which would vastly change the disputes procedure. Congress' intent, express and implied, was to return to the disputes process as it had existed before *Wunderlich*, not to introduce radically different, new elements into that process.

A brief look at the realities of the disputes procedure reveals that Congress could never have intended that the act be read as the court reads it. When a dispute arises be-

* It should be noted that, in this case, the AEC never had a "change of heart." The agency never reversed its determination of plaintiff's claims; its refusal to pay was based solely on the implied threat of the Comptroller General.

tween a contractor and the Government, the "disputes" clause sets out clearly the procedure to be followed.⁷ First, the parties may voluntarily settle the dispute. If they do, that is the end of the matter. If no settlement is reached, the disputed matters are decided by the agency's contracting officer. If the contractor does not appeal to the agency from the contracting officer's decision within the prescribed time, that, again, is the end of the matter. If, however, the contractor does appeal to the agency, then, according to the court, a decision rendered by the agency or its board⁸ favorable to the contractor is not the end of the matter; the agency is free at any time to disavow or repudiate its own decision, thereby forcing the contractor to sue. The anomaly created by the court's decision is too obvious to need elaboration. While an agency will still be bound by the decisions of its contracting officers, it will not be bound by decisions made at the highest level.⁹

⁷ The "disputes" clause which was included in the contract between plaintiff and defendant is as follows:

"(a) . . . [A]ny dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission . . . shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. . . ."

"(b) This 'Disputes' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

⁸ The following provision of the Armed Services Procurement Regulations is instructive both as to the relationship between the agencies and their boards of contract appeals and as to the expectations of the parties when entering into a contract containing a "disputes" clause:

" . . . Decisions of the Armed Services Board of Contract Appeals constitute decisions of the Head of the Department as referenced in the Disputes clause standard in all Government contracts. *It is expected that decisions favorable to the appellant in whole or in part will be promptly implemented by payment at the contracting officer level.* . . ." [Emphasis supplied. 32 C.F.R. § 1.314(g) (1970).]

The prompt payment of a claim by a contracting agency which has found it valid is the principal consideration for the unusual obligation of a Government contractor to proceed with the work while his claim is being considered.

⁹ In *Mettland Bros.*, ASBCA No. 6607, 36-1 BCA ¶5416, the Armed Services Board of Contract Appeals held that the unappealed decision of a contracting officer, under a disputes clause, becomes final and conclusive on both parties, "thereby creating vested rights in such decision." *Id.* at 25,430. If a contracting officer's decision can create vested rights in a contractor, it seems illogical to conclude, as does the court, that the decision of the agency, made at the highest level, cannot create such rights.

The suggestion that the Government, after deciding a contract dispute with one of its contractors in favor of the contractor, can then promptly disavow that decision carries with it an enormous potential for mischief. It means that the Government, after deciding that its contractor's claim is meritorious, based on a *preponderance* of the evidence presented to it, can then turn around and reject the claim because there is *substantial* evidence (*i.e.*, less than a preponderance) to support the opposite result. The majority opinion puts a tremendous economic burden on Government contractors who are now faced with the prospect of prolonged judicial proceedings in order to collect funds to which the agencies have already found them entitled. After today's decision the Government would be foolish to pay *any* board awards.

Moreover, the court's decision will utterly defeat the purpose and utility of the "disputes" clause, which has served admirably over the years, and will seriously hamper the Government in virtually all its activities whenever it is forced to call on the resources of private firms. The purpose of the clause has been to promote the expeditious performance of Government contracts. By destroying the finality of board decisions favorable to contractors, the court has assured that the performance of Government contracts will be anything but expeditious. Protracted and expensive litigation has never been known for its beneficial effect on contract performance.

It should also be noted that contract prices in the future can only be expected to rise substantially due to increased contingency costs. The court's decision effectively removes any incentive which agencies, undeterred by the costs of litigation, might have to implement board decisions by payment. Indeed, the decision gives the agencies negative incentive. We would be foolish to think that contractors will overlook, in preparing bids, the vast potential for economic coercion which today's decision places in the hands of the Government and the many locations within the bureaucracy where this potential will lie. Furthermore, this rise in contract prices will undoubtedly far exceed whatever the Government might save in those rare instances when this court or another would overturn an agency decision in favor of a contractor.

Refusing to permit agencies to disavow their own decisions would by no means make the Government easy prey for the ill founded claims of contractors. In the first place, the "disputes" clause itself puts the power of decision making in the hands of the Government. It would not be speculative to assume that, if the boards established by the Government for this purpose err, they err in favor of the Government. As Justice Jackson said, dissenting in *Wunderlich*, "[m]en are more often bribed by their loyalties and ambitions than by money." 342 U.S. at 103. Secondly, the GAO still has the authority to review board decisions for fraud or overreaching.

The statements in *O. J. Langenfelder & Son v. United States*, 169 Ct. Cl. 465, 341 F. 2d 600 (1965), and *Acme Process Co. v. United States*, 171 Ct. Cl. 251, 347 F. 2d 538 (1965), upon which the court relies for substantiation of its position, to the extent they are inconsistent with the views expressed herein, should be recognized for their unwisdom and overruled.

In conclusion, I would hold that the Wunderlich Act does not, and was never intended by Congress to, invest the federal agencies or their counsel with authority to challenge the decisions which the agencies themselves have made pursuant to a contractual provision, and that a failure by such an agency to pay an award arrived at pursuant to a "disputes" clause results in a breach of that clause.¹⁹ If the disputes procedures, which contractors must accept if they are to obtain Government contracts, are to serve the purpose of expediting the performance of contracts, it is absolutely essential that decisions adverse to the Government rendered by boards of its own creation be imbued with finality. Certainly the Wunderlich Act was never designed to bring about the chaos which I fear will be the result of the court's decision.

¹⁹ See *United States v. Marietta Mfg. Co.*, 268 F. Supp. 176 (S.D. W. Va. 1967). In that case the court held that the Government's failure to follow the disputes procedures, as found in its Federal Procurement Regulations and in the contract, was a breach of the contract.

APPENDIX B
IN THE
UNITED STATES COURT OF CLAIMS

No. 104-67

(Filed September 26, 1969)

S&E CONTRACTORS, INC. v.
THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT*
ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT

Geoffrey Creyke, Jr., attorney of record for plaintiff. *Hudson and Creyke* and *Docke, Purnell, Boren, Laney & Neely*, of counsel.

James F. Merow, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant. *Edward M. Jerum* and *Vasil S. Vasiloff*, of counsel.

OPINION

WHITE, Commissioner: This is one of the many cases involving Government contracts in which the court has been called upon to review decisions rendered by Government contracting agencies. This case is unique, however, in that here the contractor is taking the position that it is entitled to a summary judgment upon the basis of favorable decisions on its claims previously rendered by the agency with which it contracted, while the Government takes the somewhat paradoxical position that the particular decisions by its own agency were improper.

* The opinion and recommended conclusion of law are submitted pursuant to the order of reference and Rule 166(c). The facts pertinent to the disposition of the cross-motions are stated in the opinion.

Cross-motions for summary judgment have been filed by the parties. It is my opinion that the plaintiff's motion should be allowed and judgment should be entered for the plaintiff on the issue of the defendant's liability, and that the defendant's cross-motion should be denied.

I. INTRODUCTION

This case involves several claims that arose under Contract No. AT(30-3)-790 between the plaintiff and the defendant (represented by the Atomic Energy Commission). Contract No. AT(30-3)-790 ("the contract") called for the construction by the plaintiff of a testing facility for the Atomic Energy Commission ("the Commission") at the National Reactor Test Station in Idaho. The testing facility consisted of a large concrete basin and accompanying structures. The preliminary excavation work at the site of the testing facility was performed by a separate contractor, Nelson Bros.

The contract was awarded to the plaintiff on August 4, 1961, and notice to proceed with the work under the contract was given to the plaintiff on August 10, 1961. (Bids for the performance of the work under the contract had been opened on June 20, 1961, but the award of the contract to the plaintiff as the lowest responsible bidder was delayed because of difficulties encountered by Nelson Bros. in connection with the excavation of the site for the testing facility.)

Under the original provisions of the contract, the plaintiff was to receive \$1,272,000 as a fixed price for the performance of the work, and the work was to be completed within 180 days after the issuance of the notice to proceed. However, six change orders were issued during the life of the contract; and they increased the contract price to \$1,364,794.70 and extended the

time for the completion of the work from February 6, 1961, to March 23, 1962. The work was actually completed, and was accepted by the Commission, in the latter part of June 1962.

The petition refers to eight claims which were considered by the contracting officer, by a hearing examiner, and by the Commission itself, and on which the plaintiff ultimately failed to receive the desired relief from the administrative agency. However, the petition indicates that the plaintiff has abandoned one of the claims, referred to as "Felting of Damper Blades."

The nature of the remaining seven claims, and the actions that were taken on such claims by the contracting officer, the hearing examiner, and the Commission, will be summarized in parts II-VIII of this opinion.

II. THE "ACCESS" CLAIM

Under the provisions of the contract, as supplemented by a memorandum of understanding between the parties, the plaintiff was to be afforded the opportunity "to proceed with all work in the major portion of the westerly half of the building" from and after the issuance of the notice to proceed on August 10, 1961.

Asserting that the activities of Nelson Bros., the separate excavation contractor, restricted the plaintiff's access to the construction site during the period between August 10 and September 10, 1961, and thus prevented the plaintiff from proceeding "with all work in the major portion of the westerly half of the building" during such period, the plaintiff submitted to the contracting officer a request for an equitable adjustment under the "suspension of work" provision of the contract. That provision constituted paragraph 32 of the general provisions of the contract, and stated in part as follows:

The Contracting Officer may by written order direct the Contractor to suspend all or any part of the work for such period of time as may be determined by the Contracting Officer to be necessary or desirable for the convenience of the Government. If such suspension unreasonably delays the progress of the work and causes additional expense or loss to the Contractor in the performance of the work, not due to the fault or negligence of the Contractor, an equitable adjustment in the contract price and time for performance shall be made in accordance with the agreement of the parties, and the contract shall be modified in writing accordingly * * *. A failure to agree on an equitable adjustment under this clause shall be deemed to be a dispute within the meaning of the clause of this contract entitled "Disputes".

In a decision dated August 8, 1962, the contracting officer denied the plaintiff's claim for an equitable adjustment under the "suspension of work" provision of the contract. The contracting officer determined, in effect, that the plaintiff had not been adversely affected in the performance of the work because of the plaintiff's "inability * * * to have unlimited, unrestricted and exclusive access to the construction site during the period beginning August 10, 1961, and ending September 10, 1961."

The plaintiff took an appeal to the Commission from the contracting officer's determination. The appeal was taken under the "disputes" provision of the contract, which was similar to the standard paragraph on the subject of disputes customarily found in Government construction contracts, except that appeals by the contractor from decisions of the contracting officer concern-

ing questions of fact were to be taken to the Commission rather than to the individual head of a department or agency, and the Commission had not, at the time, established a board of contract appeals to act for it on contract disputes.

The Commission referred the plaintiff's appeal to a hearing examiner for the holding of a hearing and the preparation of a report. The hearing examiner's report was issued under the date of June 26, 1963.

In his report, the hearing examiner found as a fact that because the operations of Nelson Bros. during the period August 10–September 10 unduly restricted the plaintiff's access to the basin, the major portion of the basin was not available for "all" work on the part of the plaintiff at any time between August 10 and September 10, 1961. On that basis, the hearing examiner further found that the work was suspended under paragraph 32 of the general provisions of the contract until September 10, when the plaintiff obtained unrestricted access to the basin and it became available for "all" work on the part of the plaintiff. The hearing examiner concluded, therefore, that the plaintiff was entitled to a 31-day extension of the time fixed in the contract for the completion of the work, and was also "entitled to an equitable adjustment for the costs entailed by the delay." The hearing examiner did not, however, compute the monetary amount of the equitable adjustment which the plaintiff was to receive.

The plaintiff's "access" claim was considered by the Commission in a decision that was rendered on May 13, 1964. The Commission did not accept the hearing examiner's conclusion that the plaintiff's work under the contract was wholly suspended until September 10, 1961, because of the activities of Nelson Bros. On the other hand, the Commission held, in effect, that there was

some unreasonable interference by Nelson Bros. with the plaintiff's work during the period between August 10 and September 10, 1961, and that an equitable adjustment was proper to compensate the plaintiff for the delay in its operations attributable to such interference by Nelson Bros.

The Commission regarded the record before it as inadequate for the making of a determination regarding the extent to which the activities of Nelson Bros. actually interfered with the plaintiff's work during the period between August 10 and September 10, 1961. Consequently, the Commission remanded the matter to the contracting officer for the conduct of negotiations with the plaintiff looking toward a settlement relative to the amount of the equitable adjustment on the plaintiff's "access" claim, and directed that, if a settlement could not be arranged, the contracting officer should render a decision on the amount of the equitable adjustment (which would be subject to another appeal by the plaintiff to the Commission under the "disputes" provision of the contract).

For reasons that will be explained in part IX of this opinion, the plaintiff never received any administrative relief on its "access" claim under the Commission's decision.

III. THE "CONCRETE" CLAIM

The contract contained the standard "changes" provision generally found in Government construction contracts. Acting under the authority of that provision, the contracting officer on October 2, 1961, issued Change Order No. 2, which effected a substantial change in the specifications relating to the concrete work. The change order provided that "the contract price will be increased in the amount of \$90,429.00 * * * and the contract

completion date will be extended by 30 calendar days"; and that "a contract modification will be executed to formalize this change in contract price and time."

The plaintiff submitted to the contracting officer a claim which, as subsequently modified, requested that the time for the completion of the work under the contract be extended 150 days on account of the issuance of Change Order No. 2, and that the contract price be increased by the amount of \$139,807.

The contracting officer held that the time and price adjustments provided for in Change Order No. 2 were the result of prior negotiations and reflected an agreement between the plaintiff and the Government; and, accordingly, that the plaintiff was not entitled to any increase in the time extension of 30 calendar days, or to any increase in the price adjustment of \$90,429, provided for in Change Order No. 2.

The plaintiff took an appeal from the contracting officer's decision to the Commission under the "disputes" provision of the contract. This appeal was referred by the Commission to the hearing examiner previously mentioned.

The plaintiff's "concrete" claim was discussed in the hearing examiner's report of June 26, 1963. The hearing examiner found as a fact that the parties did not intend to be bound by the negotiations which preceded the issuance of Change Order No. 2; and, therefore, that Change Order 2 was a unilateral change order and did not bind the plaintiff, either with respect to the 30-day time extension or the \$90,429 price adjustment provided for in the order. The hearing examiner said that a time extension "of at least 60 days," and perhaps more, should have been granted on the plaintiff's "concrete" claim.

The hearing examiner indicated that the plaintiff's "concrete" claim should be remanded to the contracting officer for the conduct of negotiations with the plaintiff looking toward a settlement of this claim or, in the absence of an agreed settlement, for the making of a new decision by the contracting officer respecting the time and monetary adjustments to which the plaintiff was entitled on the "concrete" claim under the "changes" provision of the contract.

The plaintiff's "concrete" claim was considered by the Commission in a memorandum and order dated November 14, 1963. The Commission accepted the hearing examiner's factual finding that the parties did not intend to be bound by the preliminary negotiations which preceded the issuance of Change Order No. 2, and also left outstanding the hearing examiner's proposal that this claim be remanded to the contracting officer for the negotiation of an agreed settlement with the plaintiff, if possible, or the issuance of a new decision by the contracting officer on the amount of the equitable adjustments as to time and money which the plaintiff was entitled to receive on the "concrete" claim under the "changes" provision of the contract.

The purpose of the remand was never accomplished, for the reasons stated in part IX of this opinion.

IV. THE "STEAM" CLAIM

Paragraph SC-07 of the contract specifications provided in part that "Steam will furnished by the Commission for construction and temporary heating purposes at no cost to the Contractor providing the requirements do not overload the available service or interfere with Commission operations." During the course of the performance of the work under the contract, the plaintiff sub-

mitted to the contracting officer a claim based upon the alleged failure of the Commission to provide steam for weather protection and concrete curing during the fall of 1961 and the early winter of 1961-62.

The contracting officer denied the plaintiff's "steam" claim. In doing so, the contracting officer held that if the completion of the work under the contract "was delayed by any circumstances or factors related to the availability of Government-furnished steam, such delay was the result of fault or negligence on the part of the Contractor."

The plaintiff took an appeal to the Commission under the "disputes" provision of the contract from the contracting officer's action in denying the plaintiff's "steam" claim. The Commission referred the matter to the hearing examiner previously mentioned.

In his report, the hearing examiner found as a fact that the Commission had an adequate supply of steam at the jobsite for the use of the plaintiff—without overloading the available service or interfering with the operations of the Commission—by November 11, 1961; that the contract contemplated that such steam would be made available to the plaintiff at manhole No. 3; that almost immediately after the steam was turned on, an anchor block and expansion joints broke down at manhole No. 3 and, as a consequence, the steam was turned off; that the Commission thereafter proceeded with repair work at manhole No. 3; that everyone expected that this work would be successfully carried to completion within a short period of time, and the plaintiff was assured a number of times during the next 6 weeks that steam would soon be available at manhole No. 3, but that the repair work was not completed until April 1962, due to negligence on the part of the Commission; and that in January 1962, the plaintiff abandoned hope of receiving

steam from manhole No. 3 and tied into another manhole on the other side of the basin. The hearing examiner further found that 25 days of delay in the completion of the work under the contract resulted directly from the lack of steam.

In addition, the hearing examiner stated in his report that the Commission's action in making it necessary for the plaintiff to obtain steam at a source other than manhole No. 3 amounted to a constructive change order; and that the plaintiff was entitled to an equitable adjustment to cover the additional cost involved in obtaining steam from a source other than manhole No. 3. The hearing examiner did not compute the amount of the monetary adjustment due the plaintiff.

The plaintiff's "steam" claim was mentioned by the Commission in its memorandum and order dated November 14, 1963, and in its decision dated May 13, 1964. The Commission accepted the hearing examiner's finding that the plaintiff was delayed by, and was entitled to a time extension because of, the Commission's failure to furnish steam. However, the Commission indicated that there was an "arithmetical" inconsistency between the hearing examiner's conclusion that the delays in the completion of the work under the contract attributable to the lack of steam totaled 25 days, on the one hand, and certain specific findings made by the hearing examiner with respect to the days when such delays occurred. The Commission itself did not make any computation regarding the extent to which the plaintiff was delayed in the performance of the work under the contract by the Commission's failure to furnish steam in accordance with the provisions of the contract.

The Commission did not refer specifically to the hearing examiner's conclusion that the plaintiff was entitled to an equitable adjustment under the "changes"

provision of the contract because of the constructive change relative to the source from which the plaintiff was required to obtain the steam. Hence, it is reasonable to infer that the Commission accepted this portion of the hearing examiner's report.

The plaintiff's "steam" claim was covered by general language in the Commission's memorandum and order dated November 14, 1963, and the Commission's decision dated May 13, 1964, to the effect that the entire proceeding was remanded to the contracting officer with directions "to effect promptly equitable adjustments and payments to which the appellant [plaintiff] is entitled," and with the further directive that in the event of disagreement between the contracting officer and the plaintiff concerning a particular adjustment or payment, "the contracting officer will make a determination pursuant to the disputes clause of the contract, subject to appeal."

As indicated in part IX of this opinion, the purpose of the remand was never accomplished.

V. THE "WEATHER" CLAIM

During the course of the construction work under the contract, the plaintiff submitted to the contracting officer a request which, as subsequently amended, asked that the time for the completion of the work be extended for more than 100 days on account of adverse weather conditions. The contracting officer granted this request only to the extent of 4 days. Otherwise, the request was denied on the ground that the weather which the plaintiff encountered during the progress of the work under the contract was not any more severe than the weather which the plaintiff should reasonably have expected to encounter in the geographical area where the work was being performed.

The plaintiff took an appeal to the Commission under the "disputes" provision of the contract from the contracting officer's denial of the major portion of the plaintiff's "weather" claim.

This claim was included in the referral by the Commission to the hearing examiner, and it was discussed in the hearing examiner's report. The hearing examiner set out a considerable quantity of data concerning weather conditions where the work under the contract was performed; and the hearing examiner found that unusually severe weather directly caused 56-3/4 days of delay in the plaintiff's operations under the contract.

The plaintiff's "weather" claim was considered by the Commission in its memorandum and order of November 14, 1963. The Commission accepted the hearing examiner's finding that the plaintiff's operations were delayed by unusually severe weather. However, the Commission said that the hearing examiner's conclusion that the delays caused by unusually severe weather totaled 56-3/4 days was inconsistent with the hearing examiner's detailed findings concerning the specific days on which the plaintiff's operations were adversely affected by unusually severe weather. The Commission then indicated that it was remanding the "weather" claim to the contracting officer "for the purpose of ascertaining whether an unambiguous foundation may be achieved on which the parties may negotiate a final settlement or on which the contracting officer may reach a more detailed decision * * *."

No final action was ever taken by the agency on the plaintiff's "weather" claim, for the reasons stated in part IX of this opinion.

VI. THE "ACCELERATION" CLAIM

Paragraph GC-09 of the contract specifications required the plaintiff, within 5 days after commencing the work under the contract, to prepare and submit to the Commission for approval "a practicable schedule *** in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion at any given time"; and it further required the plaintiff to furnish such personnel and equipment, and to work for such hours, "as may be necessary to insure the prosecution of the work in accordance with the approved progress schedule." The paragraph further provided in part as follows:

*** If, in the opinion of the Commission, the Contractor falls behind the progress schedule, the Contractor shall take such steps as may be necessary to improve his progress and the Commission may require him to increase the number of shifts and/or overtime operations, days of work and/or the amount of construction plant, all without additional cost to the Government.

The original progress schedule, as prepared by the plaintiff and approved by the Commission, was revised in October 1961 to reflect the 30-day extension of time for the completion of the work under the contract granted in Change Order No. 2; and the progress schedule was further revised in November 1961 to reflect a 15-day extension of time granted in Change Order No. 3.

On December 5, 1961, the contracting officer determined, by projecting the work completed as of that date against the revised progress chart, that the plaintiff was 18 percent behind schedule on an overall basis and was 50 percent behind schedule on the concrete work in the

basin. Two days later, on December 7, 1961, the contracting officer invoked paragraph GC-09 of the general conditions of the contract and directed that the plaintiff work around-the-clock thereafter. Previously, the plaintiff was generally working a 5-day week, with a main day shift of 8 hours, a swing-shift, and a graveyard shift for maintenance.

The plaintiff contended that if the progress chart, as revised in October and November of 1961, had been further revised to take into account the extensions of time to which the plaintiff was entitled (according to the plaintiff's contentions, as summarized in parts II-V of this opinion), the plaintiff was actually on schedule in early December 1961 and, accordingly, that the contracting officer's directive for around-the-clock work was an acceleration order which entitled the plaintiff, under the "changes" provision of the contract, to an equitable adjustment covering all the additional costs resulting from the acceleration.

The contracting officer did not make any separate findings or render any separate decision on the plaintiff's "acceleration" claim. However, the contracting officer did deny the plaintiff's claims for extensions of-time on which the "acceleration" claim was based.

In the report which the hearing examiner made on the plaintiff's appeals to the Commission, the hearing examiner said that the contracting officer's calculations did not take into account certain time extensions which should have been granted prior to the time when the "acceleration" order was issued, i.e., 31 days in connection with the plaintiff's "access" claim, at least 60 days in Change Order No. 2 (rather than the 30-day extension actually granted in that order), 12 days for lack of steam, and 10 days on account of unusually severe

weather. The hearing examiner further said that if the additional time extensions to which the plaintiff was entitled as of early December 1961 were taken into account, the plaintiff was well ahead of schedule in the performance of the work under the contract as of December 7, 1961. Accordingly, the hearing examiner concluded that the contracting officer's directive of December 7 for around-the-clock work was a change order for acceleration which entitled the plaintiff to an equitable adjustment upward in the contract price to compensate the plaintiff for the extra expense resulting from the acceleration. The hearing examiner did not attempt to compute the amount of the plaintiff's extra expense flowing from the acceleration order.

The Commission did not specifically discuss the plaintiff's "acceleration" claim, as such, in the Commission's memorandum and order dated November 14, 1963, or in the Commission's decision dated May 13, 1964. It is reasonable to infer, therefore, that the Commission accepted the part of the hearing examiner's report dealing with the "acceleration" claim.

Accordingly, the "acceleration" claim is to be regarded as having been included within the scope of the Commission's action in remanding the entire proceeding to the contracting officer with a directive "to effect promptly equitable adjustments and payments to which the appellant [plaintiff] is entitled," and indicating that in the event of a disagreement concerning a particular adjustment or payment, "the contracting officer will make a determination pursuant to the disputes clause of the contract, subject to appeal."

As stated heretofore in connection with other claims, the purpose of the remand was never accomplished.

VII. THE "BACKFILL" CLAIM

Subparagraph (h) of paragraph TP-04 of the contract specifications provided in part as follows:

(h) *Moisture Control*: The maximum allowable moisture content of unplaced fill material shall be 20% of the dry weight of the material. Whenever the moisture content of material exceeds this limit, dry the material to acceptable moisture content before depositing. Whenever moisture content of placed material is raised, by rain or otherwise, above the specified limit, suspend compaction operations until fill has dried to acceptable moisture content. * * *

When the plaintiff finished laying the slabs of the concrete basin about the middle of October 1961, it backfilled to the level of the slabs, using for this purpose fill material taken from the spoil pile resulting from the operations of Nelson Bros., the separate excavation contractor. Later, the contracting officer ordered the backfill removed and replaced.

A claim submitted by the plaintiff under the "changes" provision of the contract was denied by the contracting officer; the plaintiff appealed to the Commission under the "disputes" provision of the contract; and the Commission referred the matter to the hearing examiner previously mentioned.

The hearing examiner found as a fact that when the backfill was initially put in place, it was approved by a Government inspector as having a proper moisture content; that when the work was delayed for reasons previously discussed in this opinion, the fill became waterlogged and frozen; that the fill was then reinspected; and that the plaintiff was required to remove it and replace it

from a source other than the Nelson Bros. spoil pile, which in the meantime had become unsuitable for use as fill because of excessive moisture. The hearing examiner concluded that the contracting officer's directive that the fill (which had been proper when installed) be removed, and the related directive to the effect that such fill should be replaced with material from a source other than the Nelson Bros. spoil pile, were constructive change orders which entitled the plaintiff to an equitable adjustment. The hearing examiner did not compute the amount due the plaintiff because of these constructive changes.

The Commission did not discuss the merits of the plaintiff's "backfill" claim in its memorandum and order of November 14, 1963, or in its decision of May 13, 1964. It is inferred, therefore, that the portion of the hearing examiner's report dealing with this claim was accepted by the Commission, and, accordingly, that this claim was within the scope of the Commission's action in remanding the entire proceeding to the contracting officer "to effect promptly equitable adjustments and payments to which the appellant [plaintiff] is entitled," and with an instruction that in the event of a disagreement concerning the adjustment or payment on a particular claim, the contracting officer should "make a determination pursuant to the disputes clause of the contract, subject to appeal."

The plaintiff's "backfill" claim, like the other claims previously discussed in this opinion, was never processed to a final conclusion by the administrative agency.

VIII. THE "RETAINAGE" CLAIM

In the proceedings before the hearing examiner, the plaintiff contended that the contracting officer was

retaining a total of \$92,794.70 which the contracting officer had determined was due the plaintiff under change orders issued during the course of the work under the contract; that the sum of \$8,000 otherwise due the plaintiff under the contract was being retained by the contracting officer against the possibility that the Government might be held liable to another contractor for delay in making the concrete basin (which the plaintiff constructed) available to such contractor for the performance of work under a contract other than the one involved here; and that the contracting officer was retaining the sum of \$22,280 on the ground that the plaintiff owed such amount to a supplier of aggregate that was used in the performance of the contract.

With respect to the amounts previously found by the contracting officer to be due under change orders, the hearing examiner stated in his report that "all payments withheld for work under change orders are now due and payable."

In connection with the \$8,000 allegedly withheld because of the possibility that the Government might subsequently be held liable to another contractor, the hearing examiner stated in part as follows:

**** If this is the case, this money should be paid now. It is elemental that the contracting officer has no authority to prejudice a law suit and assess damages. *** [Emphasis supplied.]*

With regard to the plaintiff's allegation relative to the withholding of \$22,280 on the ground that the plaintiff had failed to pay the full amount due a supplier of aggregate, the hearing examiner stated in part as follows:

**** If this is true, this amount should be paid now for the same reason. [Emphasis supplied.]*

Summing up his discussions concerning the plaintiff's "retainage" claim, the hearing examiner stated in part as follows:

**** Finally, if the appellant's [plaintiff's] assertions are correct, it appears that approximately \$124,000.00 is now withheld, which under this decision is due and owing. Whatever the amount is, and it is a matter of arithmetical computation, it should be paid forthwith. *** [Emphasis supplied.]*

In its memorandum and order dated November 14, 1963, the Commission stated that it left "undisturbed" the portion of the hearing examiner's report dealing with the plaintiff's "retainage" claim.

The petition in the present case refers to "the retainage amounting to approximately One Hundred Twenty-Four Thousand Dollars (\$124,000.00) which has never been paid." However, in the brief supporting its motion for summary judgment, the plaintiff states with respect to the "retainage" claim that there is no issue involved here which has to be decided by the court at this time, since the plaintiff's motion for summary judgment seeks only a review of the administrative decisions, and a judicial determination of the defendant's liability, on the other claims asserted by the plaintiff.

In connection with the "retainage" claim, perhaps it should be mentioned that, according to information received from the parties, the amounts determined by the contracting officer to be due under change orders have been paid to the plaintiff during the pendency of the present litigation.

With respect to the other items of \$8,000 and \$22,280 allegedly retained by the contracting officer, it will be noted that the pronouncements by the hearing examiner (which were left "undisturbed" by the Commission) did not constitute unequivocal administrative decisions of the sort that can appropriately be subjected to judicial review. Hence, as the plaintiff indicates in its brief, these particular matters are outside the scope of the present review proceedings.

IX. ACTION BY GENERAL ACCOUNTING OFFICE

In its memorandum and order dated November 14, 1963, the Commission directed the contracting officer "to effect promptly equitable adjustments and payments to which the appellant [plaintiff] is entitled."

Subsequently, on March 4, 1964, a certifying officer in the employ of the Commission requested advice from the General Accounting Office ("GAO") with respect to the certification of a voucher for the making of a payment in the amount of \$32,297.73 to the plaintiff under the contract. The amount set out in the voucher was said to represent three sums withheld from the plaintiff, i.e., \$22,280 withheld because the plaintiff allegedly owed such amount to a supplier of aggregate, \$8,366.19 withheld because of the Government's possible liability to another contractor, and \$1,651.54 withheld because of an alleged indebtedness by the plaintiff to still another contractor for telephone services.

It will be noted that the voucher which the certifying officer submitted to the GAO for advice covered two of the items that had been involved in the plaintiff's "retainage" claim before the hearing examiner and the Commission (although there was a variance in the amount of one of these items), but it did not cover any

proposed payment on any of the seven claims that are involved in the present review proceedings.

On December 5, 1966, the GAO advised the certifying officer in decision No. B-153841 (46 Comp. Gen. 441) that it would be improper to certify the voucher which had been submitted to the GAO, because (according to the GAO) the plaintiff did not have a valid claim for any additional compensation under the contract.

The GAO reviewed at great length the hearing examiner's report and the Commission's actions on all of the plaintiff's claims, including the "access," "concrete," "steam," "weather," "acceleration;" and "backfill" claims, which are summarized in parts II-VII of this opinion. The GAO expressed the opinion that the administrative decisions favorable to the plaintiff in connection with these claims were not supported by substantial evidence.

— Relying on the opinion expressed by the GAO, the Commission thereafter refused to take any further action on the plaintiff's claims. As a consequence, the plaintiff has never received the administrative relief which, according to the Commission's decisions, the plaintiff was entitled to receive on the claims described in parts II-VII of this opinion.¹

As the Supreme Court has said, respect should be accorded "the parties' rights to contract and to provide for their own remedies." *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966). In the contract

¹ As indicated elsewhere, it appears that part of the "retainage" claim—i.e., the item relating to amounts found by the contracting officer to be due under change orders—has been paid during the pendency of the present litigation.

that is before the court for consideration at the present time, the parties provided in pertinent part as follows with respect to the resolution of disputes that might arise under the contract:

(a) * * * [A]ny dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor [plaintiff]. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission * * * shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. * * *

(b) This "Disputes" Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

It will be noted that the plaintiff and the contracting officer provided in the contract that if they could not reach an agreement on a dispute concerning a question of fact arising under the contract, the dispute

was to be decided by the contracting officer (notwithstanding his interest as one of the parties to the contract), and that his decision was to be final and conclusive unless *the plaintiff* appealed in writing to the Commission within 30 days. Obviously, the contracting officer would be in agreement with his own decision; and if the plaintiff did not indicate disagreement with such decision within a 30-day period, it was to be finally and conclusively established that the plaintiff was in agreement with the contracting officer's decision, so that the situation at the end of the 30-day period would be one wherein both parties had reached an agreement on a matter which initially constituted a controversy between them.

Similarly, the plaintiff and the contracting officer provided in the contract that in the event of an appeal *by the plaintiff* to the Commission from a decision by the contracting officer, the decision of the Commission was to be final and conclusive "unless determined by a court of competent jurisdiction" to be invalid. Here, again, the Commission would obviously be in agreement with its own decision; and if the plaintiff was in disagreement with such decision, it was incumbent upon the plaintiff to go to a court of competent jurisdiction and attempt to have the Commission's decision overturned. In the absence of an attempt by the plaintiff to obtain judicial relief, it was to be finally and conclusively established that the plaintiff was in agreement with the Commission's decision, which would then constitute a mutually satisfactory solution of a onetime controversy and would be binding on both parties.

It would be wholly unreasonable to suppose that the plaintiff, when it agreed to the inclusion of the "disputes" provision in the contract, intended to agree that the Commission, after having made decisions favorable to the plaintiff at the conclusion of quasi-judicial

proceedings under the "disputes" provision, could then repudiate its own decisions, as was done by the Commission in the present case. On the contrary, the action of the Commission in repudiating its own decisions made under the "disputes" provision of the contract must be regarded as a breach of that provision.²

The Commission's purported justification for its refusal to carry out its own decisions made under the "disputes" provision of the contract on the plaintiff's claims discussed in parts II-VII of this opinion was, of course, the opinion expressed by the GAO in its decision No. B-153841. That was too slender a reed, however, to support the Commission's repudiation of its own decisions.

With respect to the action of the GAO in reviewing the administrative decisions rendered under the "disputes" provision of the contract on the plaintiff's "access," "concrete," "steam," "weather," "acceleration," and "backfill" claims, it must be noted that the parties had contracted for a judicial review of such decisions in appropriate instances, and not for a review by the GAO.

In this connection, it is of more than passing interest that when the matter of proposed legislation to correct the situation resulting from the Supreme Court's decision in *United States v. Wunderlich*, 342 U.S. 98 (1951), was under consideration, the GAO suggested to Congress that such legislation should expressly authorize the GAO to invalidate decisions rendered by contracting

² It should be mentioned in this connection that the record is wholly devoid of any indication that the administrative decisions favorable to the plaintiff were tainted by fraud or overreaching, or that the Commission lacked statutory authority to effectuate its decisions.

agencies under the "disputes" provisions of Government contracts if the GAO should find such decisions to be "fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence."³ However, this suggestion was objected to by contracting agencies of the Government and also by persons engaged in the business of contracting with the Government,⁴ and the proposal was ultimately rejected by Congress. It was stated in the House report on the bill⁵ which Congress eventually enacted as the so-called Wunderlich Act (41 U.S.C. §§ 321-22) that "there is no intention of setting up the General Accounting Office as a 'court of claims.'" H.R. REP. NO. 1380, 83d Cong., 2d Sess., p. 7 (1954).

The House report cited at the end of the preceding paragraph further said (pp. 6-7) that the proposed legislation would not "add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit * * *." It is pertinent, therefore, to consider the question of the jurisdiction which the GAO had prior to the enactment of the Wunderlich Act to review, "in the course of a settlement or upon audit," administrative decisions rendered under the "disputes" provisions of Government contracts.

Another court which had occasion to pass upon the question mentioned in the last sentence of the preceding

³ H.R. 1839, 83d Cong., 1st Sess., which represented the views of the GAO as to appropriate corrective legislation.

⁴ See *Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H.R. 1839, S. 24, H.R. 3634, and H.R. 6946, 83d Cong., 1st and 2d Sess., ser. 12 (1954).*

⁵ S. 24, 83d Cong.

paragraph reached the following conclusion with respect to it:

The powers of the Comptroller General are extensive and broad. But he does not, *absent fraud or overreaching*, have authority to determine the propriety of contract payments when the contracts themselves vest the final power of determination in the contracting executive department. * * * [*James Graham Mfg. Co. v. United States*, 91 F. Supp. 715, 716 (N.D. Calif. 1950). Emphasis supplied.]

In its decision No. B-153841, the GAO referred (46 Comp. Gen. at page 453) to several statutory provisions as supposedly empowering the GAO to review the administrative decisions with which we are concerned in disposing of the present cross-motions for summary judgment.

For example, the GAO referred to 31 U.S.C. § 74, which authorizes disbursing officers or the heads of governmental agencies to apply to the Comptroller General for "his decision upon any question involving a payment to be made by them or under them," and to 31 U.S.C. § 82d, which authorizes certifying officers "to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification." In the present case, the submission to the GAO was by a certifying officer, it was acknowledged by the GAO (46 Comp. Gen. at p. 446) as having been made under 31 U.S.C. § 82d (i.e., as seeking advice on questions of law), and it presented a voucher which involved the proposed payment of three items totaling \$32,297.73 and which did not include any proposed payment to the plaintiff on any of the seven claims that are now under consideration. Therefore, except for matters of law

relating to the payment of the three items in the voucher, the extensive discussion contained in the GAO's decision No. B-153841 was beyond the scope of the GAO's authority under 31 U.S.C. § 82d.

The GAO also referred to 31 U.S.C. § 71, which provides in part that "All claims and demands whatever * * * [against] the Government of the United States * * * shall be settled and adjusted in the General Accounting Office." This provision presupposes the submission directly to the GAO of claims and demands by persons asserting them against the Government—or the referral to the GAO by governmental agencies of claims and demands previously submitted to them—under circumstances where the submission or referral does not violate a contractual agreement between the claimant and the Government for another method of disposing of the claim. It certainly does not authorize the GAO to nullify the "disputes" provisions of Government contracts by preempting, on its own initiative, claims as to which the parties have contracted for a quasi-judicial procedure, to be followed by judicial review in appropriate instances.

In addition, the GAO mentioned its authority under 31 U.S.C. § 71 to settle and adjust "all accounts whatever in which the Government of the United States is concerned," and said that under 31 U.S.C. § 44 and 31 U.S.C. § 2 (note) it is authorized to examine and audit the financial transactions of the Government. However, the pronouncements by the GAO concerning the administrative decisions on the plaintiff's claims discussed in parts II-VII of this opinion were not related to the settlement and adjustment of the Government's accounts, or to the auditing of the Government's financial transactions.

The conclusion seems inescapable that the GAO, in making the pronouncements concerning the supposed

impropriety of the administrative decisions rendered under the disputes provision of the contract on the plaintiff's "access," "concrete," "steam," "weather," "acceleration," and "backfill" claims, was acting beyond the scope of its statutory authority and, in effect, was endeavoring on its own initiative to exercise a review function which the parties, in the contract, had reserved for the courts in appropriate instances.

It is not necessary in this case to determine the proper scope of the GAO's review if that agency were properly called upon, in the performance of its statutory functions, to review payments made or proposed pursuant to administrative decisions rendered under the "disputes" provision of the contract with which we are concerned. In this connection, however, it is pertinent to note again that in the "disputes" provision of this contract, the parties expressly contracted for the finality of appellate decisions rendered by the Commission on disputes concerning questions of fact, "unless determined *by a court of competent jurisdiction* to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence" (emphasis supplied). The parties evidently intended that the invalidation of administrative decisions on factual issues, rendered at the conclusion of quasi-judicial proceedings, should be surrounded by the due-process safeguards available only in the courts.

For the reasons previously stated in this part of the opinion, the pronouncements by the GAO did not provide any justification for the Commission's refusal to carry out the administrative decisions favorable to the plaintiff rendered under the "disputes" provision of the contract on the claims discussed in parts II-VII of this opinion, and such unwarranted refusal must be regarded

as a breach by the Commission of its contractual obligations.⁶

X. FUTURE PROCEDURE

A period of more than 5 years has elapsed since the Commission rendered its final decision of May 13, 1964, on the claims that are involved in the present review proceedings. Although the administrative determinations on such claims were favorable to the plaintiff, the latter has never received the relief which, according to the Commission, the plaintiff was entitled to receive on the claims now under consideration.

Consequently, we have here a case where the administrative procedure under the "disputes" provision of a Government contract has proved to be "inadequate" or "unavailable" for the final disposition of claims submitted by the contractor. This being so, the court may properly proceed—and should proceed—with the holding of a trial *de novo* in order finally to dispose of these claims without further undue delay by determining the amounts which the plaintiff is justly entitled to receive on such claims. See *United States v. Anthony Grace & Sons, Inc.*, *supra*, 384 U.S. at pp. 429-30.

RECOMMENDED CONCLUSION OF LAW

Upon the foregoing opinion, which is adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover on its "access," "concrete," "steam," "weather," "acceleration," and "backfill" claims, and judgment is entered to that effect. The plaintiff's motion

⁶ See footnote 2.

for summary judgment is allowed as to such claims, and the defendant's cross-motion for summary judgment is denied. The amount of the recovery will be determined in subsequent proceedings under Rule 131 (c), which will be combined with proceedings for the determination of the defendant's liability and the amount of the recovery (if any) on the plaintiff's "retainage" claim.

APPENDIX C

To M. A. Palmeter, Atomic Energy Commission, December 5, 1966:

We refer to your letter of March 6, 1964, in which you request a decision as to whether an attached Standard Form 1166, Voucher and Schedule of Payments, No. 64-274, may be certified for payment. Your request for a decision is made in accordance with the provisions of 31 U.S.G. 82d.

The voucher relates to a decision (S&E Contractors, Inc., Docket Nos. CA-161 and 162, issued on June 26, 1963) by Mr. E. Riggs McConnel, Hearing Examiner, which was reviewed by the Commission under procedures applicable to the determination of disputes arising under Atomic Energy Commission (AEC) contracts. The total amount of the voucher is \$32,297.73 and represents sums withheld from payment by the contracting officer under contract AT(30-3)-790 (hereafter "contract 790"), with S&E Contractors, Inc., payment of which has been directed by the decision referred to.

Specifically the voucher lists three items: (1) \$22,280 representing the amount allegedly owed by S&E to an AEC cost-type contractor for material furnished for contract 790 and which the cost-type contractor assigned to the AEC by instrument dated June 26, 1962; (2) \$1,651.54 which represents the amount allegedly owed by S&E to an AEC cost-type contractor for telephone services furnished by an AEC cost-type contractor for performance of work under contract 790 and which the cost-type contractor assigned to the AEC by an instrument effective as of September 5, 1962; and (3) \$8,366.19 which, according to the contracting officer, represents an alleged debt due by S&E to the AEC as damages under contract 790 on the basis that S&E's delay in completing its contract rendered the Government liable for damages to another contractor to whom

the site was to have been made available at an earlier date. Items 1 and 3 were considered by the Hearing Examiner in the above cited decision and he concluded that such withheld amounts should be paid forthwith.

In regard to the third item in the voucher your letter of March 6 relates the following information:

With respect to the \$8,366.19 item, previously mentioned, on the matter of Contractor default at the time of performing its obligations under Contract No. AT(30-3)-790, the following related and significant aspects should be considered inasmuch as the Contractor has submitted a claim against the Government in which he is asking for \$2,127,291 of additional costs.

The Contracting Officer, during the performance of the contract, desired to make certain changes in the drawings and specifications that would increase the amount due under the contract and the time required for its performance. The Contracting Officer, not wishing to avail himself of his unilateral rights under the Changes article, requested a proposal from the Contractor which it submitted by letter dated September 27, 1961, in which it asked for a net increase of \$145,704 and proposed that the attendant time additive be negotiated at a later date. The Contracting Officer informed the Contractor its quotation was unacceptable, whereupon the parties apparently entered into negotiation to reach acceptable terms. It appears the parties succeeded. The Contractor thereupon submitted its revised proposal dated October 2, 1961, followed the next day by the Government's Change Order No. 2, which

accepted the substantive terms proposed by the Contractor and made stipulated changes in the drawings and specifications. Subsequently, on October 27, 1961, the Contracting Officer forwarded to the Contractor for signature a document entitled Amendment No. 1 which embodied Change Order No. 2 and a previous change order. The Contractor apparently did not communicate again with the Contracting Officer regarding Amendment No. 1 until it sent the Contracting Officer its letter dated November 24, 1961, which requested either a revised Change Order for \$139,807 and a 60 day time extension or for the Contracting Officer to handle the Change Order on a unilateral basis and use the Government estimate for pay purposes for the changes.

The particular items as to whether payments based thereon would be lawful obligations of the Government are:

1. Was Change Order No. 2 a binding contract?
2. Was it proper to allow time and the amount of time allowed for the alleged breach of the Government's obligation to furnish steam?
3. Was the legal standard used in computing the amount of time allowed for "weather" proper?

Your letter also questions whether it was proper for the Hearing Examiner to allow S&E 31 days for alleged suspensions of work during the first part of the contract performance. At the time of your letter this question had not yet been resolved by the Commission which had

the matter before it for review upon appeal by the contracting officer from the Hearing Examiner's decision.

The questions presented by your submission arose from the following transactions:

On May 15, 1961, the AEC issued an invitation for bids for construction of an enclosed testing basin at a site in the State of Idaho. Specifications accompanying the invitation for bids called for construction of a test plant building 320 feet long, 112 feet wide and 65 feet high, and a reinforced concrete basin within the building measuring 250 feet long, 45 feet wide and 36 feet deep. The building was to be made of structural steel with aluminum siding and composition roof. Concrete walls in the basin were to be reinforced by massive counterforts in order to withstand the water pressure when the basin was filled. The specifications also called for the extension of steam, water, power, telephone and fire alarm utilities to the building from existing services; the erection and test of two 100 ton, 100 foot span Government-furnished bridge cranes within the building; and the extension of a railroad spur from a point approximately 100 feet outside the building to within the building. Piping, plumbing, heating and ventilation were to be provided. Backfill was to be put in place and compacted as the work on the basin progressed so that when finished the basin would be completely flush with the ground. By the terms of the invitation for bids the entire project was to be completed within 180 days after the notice to proceed.

Excavation of the site had been previously contracted for with Nelson Bros. Construction Company of Salt Lake City and was nearing completion. Bids were opened on June 20, 1961. Four bids were received, ranging from a low bid of \$1,272,000 by S&E Contractors to a high bid of \$1,413,600. Sixty days after the

date of opening, unless otherwise stated by the bidder, were allowed for award of a contract. S&E did not restrict this time in its bid, and neither S&E nor any other bidder excepted to the invitation requirement that the contract work be completed 180 days after receipt of notice to proceed.

Because of delays in the performance of the excavation for the basin, due to unforeseen subsurface conditions, it appeared that it would not be possible for the construction contractor to be given full access to the project site until about the end of August 1961. The low bidder, S&E, was therefore requested to confer with the contracting officials concerning the effect of this delay, and a conference was held on August 2, 1961, as a result of which S&E and the contracting officer executed a "Memorandum of Understanding" dated August 2, 1961, which recited the above facts, that unlimited access to the basin foundation might not be granted before September 10, and that the contracting officer intended "to release the basin foundation for work by the contractor in sections as it is completed." S&E agreed that, should it be awarded the contract and should unlimited access to the basin foundation be granted on or before September 10, 1961, "no change in completion time or contract price will result from either the award of this contract at any time within 60 days of June 20, 1961, or from the issuance of partial notice to proceed and possible joint occupancy prior to September 10, 1961, with the understanding that S&E Contractors, Inc., will be allowed to proceed with all work in the major portion of the westerly half of the building."

In accordance with this agreement, the contract was awarded to S&E on August 4 and on August 10 a notice was issued to the contractor "to proceed with all work in the major portion of the westerly half of the building." By telegram dated September 10 the contractor

was granted "unlimited access to the test plant basin foundation" and "notified to proceed with all work under the subject contract."

During performance of the work several change orders were issued, two of which included extensions of 30 and 15 days, respectively, in the time for performance, making a total performance time of 225 days from the date of receipt of notice to proceed. The work was completed and accepted on June 29, 1962, or 323 days after the initial notice of August 10, 1961.

By various letters written during the winter and spring of 1962 the contractor presented a number of claims for extensions of time for alleged excusable delays, and a claim for additional compensation of \$1,415,467.05 based on the difference between alleged "actual costs" of \$2,695,177.18 (including overhead and profit) and "reasonable cost of original work" of \$1,272,000 (the amount of the contractor's accepted bid).

The contracting officer rendered his decision on August 8, 1962. The decision discussed and analyzed S&E's claims at considerable length and for the reasons stated therein, which we need not go into at this point, he denied most of them, concluding as follows:

1. The contractor's claim for contract time extension based on the Contractor's contention that the contract performance time did not begin until September 10, 1961, is denied.

2. To reflect an equitable adjustment of the contract price, resulting from the issuance of all of the change orders issued pursuant to the provisions of Clause 3 of the General Provisions of the contract, the contract price should be, and it hereby is, increased by

\$92,794.70 from \$1,272,000 to \$1,364,794.70. To reflect an equitable adjustment of the contract performance time resulting from the issuance of said change orders, said contract performance time should be, and it hereby is, extended by 45 calendar days from 180 calendar days to 225 calendar days.

3. To compensate for the delay caused by the strike of laborers, which began on January 12, 1962, and ended on January 19, 1962, the contract performance time should be, and it hereby is extended by 7 calendar days from 225 calendar days (see paragraph 2, above) to 232 calendar days.

4. To compensate for the delay caused by the strike of carpenters, which began on March 14, 1962, and ended on March 15, 1962, the contract performance time should be, and it hereby is, extended by 2 calendar days from 232 calendar days (see paragraph 3, above) to 234 calendar days.

5. The contractor's claim for contract time extension based on availability of Government-furnished steam, is denied:

6. The contractor's claim for contract time extension based on allegations of delay in the performance of backfill operations, is denied.

7. The contractor's claim for contract time extension based on allegations of unusually severe weather conditions is allowed only to the extent that the contract time is

extended by 4 calendar days from 234 calendar days (see paragraphs 2 and 3 above) to 238 calendar days. As adjusted by this and the foregoing provisions of this decision, the contract required completion of all work thereunder on or before April 5, 1962.

8. The contractor's claim for contract time extension based on allegations that it was not possible to perform the contract work within the time prescribed by the contract is denied.

9. The contractor's claim for additional compensation in the amount of \$1,415,467.05, based on the Contractor's allegations as to the actual costs which it incurred in the performance of the contract work is denied.

S&E filed its notice of appeal from this decision on September 4, 1962. The contractor took issue with all of the contracting officer's findings except those relating to time extension for labor disputes. The appeal was docketed as CA-161. During a prehearing conference on October 19, 1962, S&E requested leave to amend its complaint to include additional claims not covered in the contracting officer's decision of August 8. Some of these claims had never been formally presented to the contracting officer and it was agreed that these claims would be submitted for decision. This was done by letters to the contracting officer sent on October 22, which incorporated by reference several preceding letters. Eight new claims were asserted:

(1) S&E demanded immediate payment of \$92,794 which represented the amount found to be due by the contracting officer for the 6 change orders in paragraph 2 of his

August 8 decision. S&E, however, guarded its right to claim more for Change Order No. 2.

(2) S&E asserted that the contracting officer had withheld \$8,000 on the ground that S&E's failure to have the basin ready at a certain time gave rise to a cause of action for breach of contract on the part of Electric Boat Company in connection with the timing of its work on the submarine hull installed in the basin. The contractor demanded immediate payment of this amount, contending that the contracting officer had no power to assess unliquidated damages.

(3) S&E demanded immediate payment of \$22,280 which was withheld by the contracting officer on the basis that S&E owed this amount to H.K. Ferguson & Co. (an AEC cost-type contractor) for aggregate material furnished S&E.

(4) The contracting officer had withheld \$1,272 from the price of the original contract under his authority to withhold 10 percent of payment as the work progressed. S&E demanded immediate payment of this amount, less \$100 to keep the contract open.

(5) S&E claimed an equitable adjustment in the amount of \$2,323.75 for certain work on the foundation of column line B.

(6) The sum of \$1,322.24 was claimed for the costs of shifting from the pile of aggregate which was provided by the Government to a new pile, when the aggregate used was found by the Government to be inadequate.

(7) The sum of \$3,197.65 was claimed for repairs and modification work on the crane over and above that required by the contract.

(8) An equitable adjustment was claimed for putting felt in the ventilators which were installed for air conditioning purposes.

On November 8, 1962, the contracting officer allowed the sum of \$1,954.41 for extra work on the foundation of column line B but denied all of the other claims. S&E filed a notice of appeal from this decision on November 23, 1962, which was docketed as CA-162. The two appeals were consolidated and hearings were held before the Hearing Examiner in Idaho and Washington, D.C., during the months of December 1962 and January 1963. The Hearing Examiner rendered a decision on June 26, 1963, in which he sustained the appeal of S&E on most of its major claims.

The unresolved claims in the two appeals were grouped for treatment by the Hearing Examiner as follows:

1. Time for Commencement of Performance
2. Change Order No. 2
3. Non-availability of Steam
4. Extensions for Weather
5. Acceleration
6. Backfill
7. Miscellaneous Claims
 - a. Column line B
 - b. Change in connection with aggregate
 - c. Work on crane
 - d. Felting of dampers
8. Impossibility of Performance at Outset

9. Monies withheld and mode of settlement, if any, will be discussed briefly, in the conclusion.

The Hearing Examiner held that the contractor was entitled to equitable adjustments under Nos. 1, 2, 3, 4, 5, 6 and 7(d) of the above claims. Claims 7(b), 7(c) and 8 were denied, and 7(a) was held to involve merely a question of quantum, which was not considered on the appeal. Under 9 he held that the net amount of \$92,794.70 due under the several change orders as issued by the contracting officer should be paid immediately, together with any amounts being withheld to cover the Government's possible liability to Electric Boat and the claim for aggregate furnished by H. K. Ferguson, these being two of the three items included in the voucher forwarded with your submission. No reference was made to the third item.

Having excluded the question of amount from his consideration at the outset of the hearing, the Examiner made no findings with respect thereto, but ordered that the parties proceed without delay to "negotiate" a final settlement in accordance with the decision.

On July 10, 1963, the contracting officer presented a motion to the Atomic Energy Commission to extend the time to petition for review of the Hearing Examiner's decision. This motion was granted by Commission Order dated July 12, 1963. By petition dated July 30, 1963, with supporting brief attached, the contracting officer requested that the Commission review the Examiner's decision. On November 14, 1963, the Commission in a *Memorandum and Order* granted the contracting officer's petition for review with respect to four issues only. They were listed as follows:

- a. Alleged arithmetical error in the summation of delays attributable to unusually

severe weather and failure of the Government to furnish steam for curing concrete on the basis of the hearing examiner's specific findings of such delays before and after December 7, 1961;

b. The propriety of the hearing examiner's decision that an equitable adjustment of costs and of the 180 day period of performance specified in the contract is to be allowed on account of delay from August 10, 1961, to September 10, 1961, in making the site available to S&E Contractors, Inc.;

c. The propriety of the hearing examiner's conclusion that, under the terms of the contract, the contractor was not required to install felting on the blades of the dampers of the ventilating units installed, and that the contractor is entitled to additional compensation for the installation of such felting;

d. The propriety of the hearing examiner's admission in evidence of a telegram from Trane Manufacturing Co. to S&E Contractors, Inc., dated June 6, 1962, dealing with the necessity and desirability of installing felting on the blades of the ventilating units.

The petition of the contracting officer for review of the decision in all other respects was denied. However, pending the ultimate determination of the appeal, the Commission deleted the last paragraph of the Examiner's decision and substituted in lieu thereof the following:

It is ordered That the appeal is sustained; the decisions of the contracting officer herein are set aside to the extent set forth in this

decision; and the contracting officer is directed to effect promptly equitable adjustments and payments to which the appellant is entitled. In the event of disagreement concerning the adjustment or payment, the contracting officer will make a determination pursuant to the disputes clause of the contract, subject to appeal.

On November 25, 1963, the contracting officer petitioned the Commission to reconsider its *Memorandum and Order* of November 14, 1963, on the basis that the Commission should have granted review of the Hearing Examiner's decision *in toto* rather than on only the four issues actually granted. This petition was denied by the Commission on February 11, 1964. However, with respect to the assignments to the AEC of the two claims against S&E by H. K. Ferguson and Phillips Petroleum Company, the Commission held that if at the time of payment which was directed in its order of November 14, 1963, it appeared that there was a lawful claim of the Government against S&E then that fact could be taken into account in making the adjustment.

As noted earlier, your letter of March 6, 1964, was forwarded to our Office by letter of March 27, 1964, from Mr. A. R. Luedecke, General Manager of the AEC. At that time the appeal to the Commission was still pending. The Commission rendered its decision on May 13, 1964, and a copy of this decision was transmitted to our Office by letter dated May 21, 1964, from the Acting Assistant General Manager of the AEC.

In its decision the Commission confined itself to consideration of the last three issues designated in its order of November 14, 1963, since the contracting officer had previously waived his right to file exceptions on the first issue specified. Such waiver was based on the

ground that the interests of the Government would not be served by seeking a modification limited only to *arithmetical errors* in the computation of delays attributable to unusually severe weather and failure to furnish steam.

Upon this limited review, the Commission reversed the Hearing Examiner's decision that the contractor was entitled to adjustment for the full 31-day period from August 10 to September 10, 1961, ruling that there should be deducted from that period of time such part of it as was in fact usefully occupied by the contractor, but leaving that for determination as a part of the final settlement negotiations. The Commission also reversed the Examiner's allowance of claim 7(d), and modified the Final Order of the Examiner as above noted.

It is our understanding that payment has been made of the entire balance of the original contract price, as modified by the several change orders, less the amount covered by the voucher submitted by your letter of March 6, 1964.

The question initially presented by your submission is, therefore, whether the Hearing Examiner's decision (to the extent that it has been affirmed by the Commission) that the Government's withholding of the voucher items is improper, and that the amount thereof should be paid forthwith, is a final and conclusive adjudication which would preclude any exception by our Office to a payment made in obedience thereto. Since the decision in that respect involves primarily and essentially a question of law, we have no hesitancy in concluding that the decision in that respect does not bind this Office, and that we must therefore determine whether the decision is correct. In making that determination we recognize and acknowledge that under the stipulation of the Disputes

clause of the contract and the provisions of the "Wunderlich" act of May 11, 1954, 68 Stat. 81 (41 U.S.C. 321-322) we must accept as conclusive the decision of the Commission and its authorized representative, as to disputes of fact, unless such decision is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

In order to enable us to make this determination we requested, and the Commission furnished, the complete record of the appeal proceedings (with the exception of certain exhibits hereinafter referred to). Believing that our responsibility for the settlement of all claims against the Government and for the auditing of the financial transactions of the administrative agencies of the Government would not justify us in sanctioning, even by silence, the payment of any claim which was brought to our attention and to which we would feel bound to take exception in our subsequent audit, we reviewed the entire record, not only with respect to the particular items involved in the voucher submitted but also with respect to all of the claims considered.

Upon our initial review of the record we reached certain tentative conclusions which were set forth in detail in a document. Upon the request of S&E's attorneys that they be permitted to review and file a reply brief commenting in detail thereon, a copy of this document was forwarded to S&E in care of its attorneys with instructions that the reply brief be limited to the record made before the Hearing Examiner, since we would not consider any new matter not previously received as evidence by the Examiner. Since the contracting officer and the Atomic Energy Commission also had an interest in the outcome of any decision our Office might reach, copies of the document were furnished to them by letter

of February 26, 1965, with similar instructions to limit all comments to the record made before the Examiner.

By letter of April 23, 1965, the contracting officer's attorney submitted a comprehensive (53 page) legal brief commenting on various facets of our draft document. By letter dated June 1, 1965, the attorneys for S&E submitted their legal brief. This brief was also comprehensive (51 pages) and commented in detail on the initial conclusions contained in the draft document. By letter of August 6, 1965, the Chairman of the AEC advised us that, under the circumstances, he did not believe it would be appropriate or desirable for the Commission to comment on any proposed action by our Office bearing upon the correctness and conclusiveness of the Commission's decision.

Thereafter, at the request of S&E's attorneys conferences were held in our Office on April 15 and 20, 1966, at which time the various issues in the Examiner's decision were discussed in considerable detail. At the conclusion of the April 20 conference a request was made that S&E be allowed to submit an additional brief which would be primarily directed at showing what items in evidence before the Examiner would constitute "substantial evidence" in support of the Examiner's decision. This brief was submitted on July 20, 1966.

Our decision in this case has been reached after a full and careful consideration of the briefs submitted by the attorneys for S&E and by the contracting officer's attorney. However, before we turn to an examination of the Hearing Examiner's decision, we should like to comment upon a basic question raised in S&E's briefs of June 1, 1965 and July 20, 1966, concerning the authority and jurisdiction of our Office to review the Examiner's decision as modified by the Commission.

S&E's brief of June 1, 1965, takes the position that the injection of our Office into a proceeding of this nature where the terms pertaining to settlement of disputes arising under a Government contract have been fully complied with by both the contractor and the Government agency, and where further recourse lies for both in the courts, is entirely improper. As such, S&E states, it constitutes a breach of the contract by the United States, it is an unwarranted attempt to usurp power granted by law and contract to the AEC, and it injects our Office into a proceeding in which our Office has no position.

In support of these statements, S&E points out that an orderly procedure has been established and substantial tentative finality has been attached to factual determinations in administrative proceedings of this nature, by the Disputes clause of the contract, the Wunderlich Act, the decision in *United States v. Bianchi*, 373 U.S. 709, and the disputes procedures of the AEC, including a review by the Commission itself. Also, according to S&E, it cannot be said that the injection of our Office into this situation is necessary to protect the Government's interests, since it has been clearly established that under the Wunderlich Act a judicial review is available in the courts to either a contractor or the Government under the holding in *C. J. Langensfelder & Son, Inc. v. United States*, 169 Ct. Cl. 465, 341 F.2d 600 (1965).

S&E contends that our Office in purporting to act under the Budget and Accounting Act, 1921, 31 U.S.C. 41, is proceeding under what is only the "color of authority" and that the true intent of Congress with respect to our functions is that we be involved in the legality of expenditures, but not in disputes clause proceedings. S&E states that any right on our part to be involved in such proceedings cannot be inferred from this

"ancient" statute (i.e. Budget and Accounting Act, 1921) when at a later date, in passing the Wunderlich Act, 41 U.S.C. 321, 322, powers of this nature were sought by our Office and expressly rejected. In support of this contention, S&E cites a statement appearing in H. Rept. No. 1380, 83d Cong., to the effect that objections were raised by the Department of Defense and various defense industries to the inclusion of the Comptroller General in the wording of the act because of the supposed fear that such inclusion would destroy the finality which existed under Defense Department procedures. S&E concedes that the conclusion of the report states that there was no intent to enlarge or change the jurisdiction of our Office; however, it is argued, the subsequent logical evolution of orderly administrative procedures where both sides have a fair opportunity to be heard, subject to judicial review, negatives the concept that our Office has any cognizance over such proceedings.

S&E notes that the United States Supreme Court and our Office have recognized the principle of *United States v. Holpuch*, 328 U.S. 234, to the effect that where a contract provides a fact finding and disputes procedure the same are mandatory on all parties. S&E concludes that:

* * * It cannot be denied that the Comptroller General has at all times undertaken to maintain some element of jurisdiction in such matters, but historically he has only undertaken to invoke it in extraordinary circumstances involving a situation where there is no other recourse available to the Government. This is not true in the present circumstances, particularly in the light of the recently re-emphasized doctrine of the right of judicial review of a board proceeding.

Most noteworthy, according to S&E, our action in the instant case, while giving lip service to recognizing the limitations on our powers as to the redetermination of the facts, has proposed more than a 200 page draft review. S&E contends that "the right not to be judged, except in an open proceeding where all evidence, witnesses and parties, can be heard, and where your opponent was separated from your judge, is paramount throughout all considerations of appeals and disputes procedure." S&E concludes that by the most favorable interpretation of all the existing law and decisions, the most that could be said is that our Office may have a right to consider solely questions of law pertaining to the disbursement aspect of this case.

In its brief of July 20, 1966, S&E notes that the language of the Disputes clause embodied in the S&E contract states that the decision of the Commission or its duly authorized representative for the determination of appeals shall be final and conclusive unless determined by a "court of competent jurisdiction" to have been fraudulent, or capricious, or arbitrary, etc. Since the General Accounting Office is not a "court of competent jurisdiction" our Office, S&E contends, is without authority to review the Examiner's decision, pointing out that H. Rept. No. 1380, 83 Cong., states in part: "At the same time there is no intention of setting up the General Accounting Office as a 'Court of Claims.'" S&E contends that the exercise of review functions in this case would make the General Accounting Office another Court of Claims. In addition, S&E contends that over the past 12-year period between 1952 through 1964 our published decisions do not indicate that we have ever reviewed administrative findings on questions of fact.

In connection with the jurisdictional questions raised by S&E above, it is noted that your letter

requesting a decision raises questions and issues that go to the very heart of the Hearing Examiner's decision. Many of the issues raised in your request for decision involve legal questions, but these are, at times, so enmeshed with questions of fact that the strict legal questions cannot be readily separated from those of a factual character. In submitting your letter of March 6, 1964, to our Office, the General Manager, in his letter of March 27, 1964, noted that your request for decision was made pursuant to 31 U.S.C. 82d which provides that certifying officers shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification. The General Manager stated that the forwarding of your request should not be construed as a request by the Commission for our review of, or concurrence in, the decision reached under the Commission's procedures for decisions of contract disputes and he added: "You will note that the Certifying Officer states the decision in this case appears to be based primarily on questions of law."

While it is true that the questions decided by the Hearing Examiner were in many cases questions of law, the jurisdiction of this Office to review decisions by contracting Agencies rendered under Disputes clauses of Government contracts is not limited to review of legal questions only, but extends, as well, to review of questions of fact and so-called mixed questions of law and fact.

Under the Budget and Accounting Act, 1921, 42 Stat. 24, 31 U.S.C. 44, and the Budget and Accounting Procedures Act of 1950, 64 Stat. 832, 31 U.S.C. 2 note, the Comptroller General of the United States, as the agent of the Congress, is vested with authority to examine and audit the financial transactions of the Government. Section 305 of the 1921 act, 31 U.S.C. 71, pro-

vides that all claims and demands whatever by or against the Government and all accounts whatever in which the Government is interested, either as debtor or creditor, shall be settled or adjusted in the General Accounting Office. Section 304 of the same act, 31 U.S.C. 74, authorizes disbursing officers, and the heads of departments and establishments, to apply to the Comptroller General for his decision upon any question involving a payment to be made by them or under them. Also, as you know, the provisions of 31 U.S.C. 82d under which you requested a decision in the present case, provide authority to the Comptroller General to render decisions on legal questions involved in vouchers presented for certification.

Under the terms of these statutes it is well established that the legal propriety of payments made by public officers in the transaction of the Government's business is subject to determination by the General Accounting Office and that such payments are not final until settled by the General Accounting Office which may disallow credit in the accounts of the fiscal officers of the Government for disbursements not made in accordance with law. Accordingly, in transactions involving an expenditure of public funds we have regularly reviewed the conditions underlying any payment made pursuant to a contractual agreement and, if it appeared that any payment had been improperly made or that a contractor had been unjustly enriched at the public expense, we have taken whatever action was necessary to recover any amounts improperly paid. In that connection, Section 93, Title 31, U.S. Code, provides that the General Accounting Office shall superintend the recovery of all debts finally certified by it to be due to the United States. See also the provisions of 31 U.S.C. 82a-2(b). Conversely, a contractor who feels that he is entitled to an additional amount under a contract may present a claim to the General Accounting Office

for settlement, regardless of the administrative action taken in the matter.

While we have always recognized that in settling such claims we are bound to accept the administrative determination of the pertinent facts to the extent that such determinations are entitled to finality, we have always reviewed, and sometimes questioned, administrative decisions under the standard "Disputes" clause on the basis of the standards prescribed in the Wunderlich Act, 41 U.S.C. 321, 322. We believe that our jurisdiction to review Disputes clause decisions on such basis, as well as any other administrative determinations, is clearly conferred by the basic settlement and audit authority granted by the Budget and Accounting Act, 1921. In that regard it might be pointed out that the claims settlement provisions of section 305 of the Budget and Accounting Act, 1921, have a long history, being derived from the act of March 3, 1817, 3 Stat. 366. While our claims determinations thereunder have no effect on the rights of contractors to pursue any judicial remedies which may be available to them and are of no binding effect in judicial proceedings, they are binding upon the executive agencies.

In regard to S&E's assertion that our Office is not a "court of competent jurisdiction" within the meaning of that phrase as set forth in the Disputes clause of its contract, we need only note that it is the Wunderlich Act and not the Disputes clause which governs the matter. See *C.J. Langenfelder & Son, Inc. v. United States*, *supra*, wherein the contractor argued that the literal language of the Disputes clause made an administrative decision in its favor final and conclusive. The contractor argued that this conclusion was strengthened by the fact that the Disputes clause does not set forth any right on the part of the Government to appeal an

adverse decision and sets up no procedure for such appeals. The Court of Claims rejected this argument stating (footnote 7):

*** Rather, it is the Wunderlich Act which is determinative. The minimal bounds of judicial review must be drawn from the terms, history, and policy of that act not from policies speculatively drawn from the contract clauses which are themselves governed by the statute.

Other aspects of the Wunderlich Act and the role of our Office thereunder were set forth in the *Langenfelder* case as follows:

1. Plaintiff first asserts broadly that a final decision by the head of a department for the contractor is conclusive and cannot be re-examined in any way by this court. The argument is that one who contracts with the Government has virtually no choice concerning the contract's standard terms; not the least restrictive provision is the Disputes Clause setting out a complete arbitral system to which the contractor must submit whenever a controversy arises under the contract; the *quid pro quo* for these restrictions is, in plaintiff's view, that a decision in the contractor's favor at either of the two stages of this imposed arbitral process (by the contracting officer or the department head) may not be challenged by the Government.

Whatever may have been the rule or the practice before the Wunderlich Act, 68 Stat. 81, 41 U.S.C., §§ 321-22, that statute compels us to reject plaintiff's suggestion. It is in effect asking that we read into all government contracts (with Disputes Clauses) the provision

that a claim otherwise properly before the court may not be decided on the merits if there was a prior administrative determination favorable to the contractor, i.e., a clause that administrative determinations for the contractor are automatically conclusive. The standard Disputes Clause does not and cannot now contain such a limitation, because the Wunderlich Act specifically prohibits the inclusion in a government contract of any clause making the decisions of an administrative official on questions of law or fact completely final and free from judicial review, 68 Stat. 81, 41 U.S.C. §§ 321-22. The Act, phrased in universal terms, makes no qualification or exception for administrative orders sustaining the contractor.⁷ The opinions which may indicate a

⁷ In an attempt to overcome the impact of the Wunderlich Act, plaintiff emphasizes the part of the Disputes Clause specifying the procedure by which a contractor may appeal an adverse decision by the Contracting Officer, but omitting any corresponding right on the part of the Government. Plaintiff also points to Federal Aviation Agency regulations to the same effect. See 41 C.F.R. §§ 2-60.3, 2-60.6. By analogy or implication, plaintiff urges, the same policy should govern decisions by the head of the department. But the provisions relied upon by plaintiff do no more than outline the appellate procedure to be followed within the agency. Though they may be crucial when the court is called upon to dismiss a contractor's petition for failure to exhaust administrative remedies, they are irrelevant in the present context. Rather, it is the Wunderlich Act which is determinative. The minimal bounds of judicial review must be drawn from the terms, history, and policy of that Act, not from

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contrary position were all handed down before the passage of the Wunderlich legislation. In cases decided subsequent to its enactment, this court has not hesitated to reexamine administrative determinations upholding the contractor, and to upset them if the standards for review set forth in the statute call upon us to conclude that the decision below should not stand * * *. [Citations omitted.]

The legislative history of the Wunderlich Act confirms the position, implicit in the statutory language, that administrative rulings against the Government are not wholly free from judicial review. The Comptroller General had long asserted authority to examine such determinations and to deny payment on the basis of illegality. When the Supreme Court held, in *United States v. Wunderlich*, 342 U.S. 98 (1951), that decisions under the Disputes Clause were final unless fraud was alleged and proved, the Comptroller General conceded that, as a result, his powers of review had been eliminated. See Hearings on S. 2487 Before the Subcommittee on Finality Clauses in Government Contracts of the Senate Committee on the Judiciary, 82d Cong., 2d sess. 413 (1952).

⁷ (Continued)

policies speculatively drawn from the contract clauses which are themselves governed by the statute. We read the statements of commentators (cited by plaintiff), saying or implying that only the contractor may "appeal" from an adverse decision, as either referring to appeals within the agency or as suggesting the practical unlikelihood that the Government will (or will be able to) obtain judicial review as a regular matter of course.

One of the major reasons for the passage of the new Act was to assure to the General Accounting Office a limited right of scrutiny comparable to (though perhaps not precisely the same as) that given to the courts.⁸ Though his power to utilize all of the Wunderlich standards has been questioned by some, the Comptroller General has asserted, since the enactment of the statute, the same authority as the courts to disallow payment of a contractor's claims notwithstanding agency decisions in the contractor's favor. See, e.g., 35 Dec. Comp. Gen'l 63, 70 (1955), and GAO decisions referred to in the articles cited in footnote 8, *supra*. Where the issue is one of law (e.g., interpretation of the contract), this court has upheld exercises of that power. See *Associated Traders, Inc. v. United States*, *supra*, 144 Ct. Cl. at 749, 750, 169 F. Supp. at 505, 506-07 (1959); *Northrop Aircraft Inc. v. United States*, *supra*, 130 Ct. Cl. at 629-33, 127 F. Supp. at 599-601 (1955).⁹ The present

⁸ See 1954 U.S. Code Cong. & Adm'n News 2191, 2196-97; Note, 70 Harv. L. Rev. 350, 358-59 (1956); Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 Law and Contemp. Prob. 39, 81-82 (1964); Spector, *Is it "Bianchi's Ghost"—Or "Much Ado About Nothing?"*, 29 Law and Contemp. Prob. 87, 108-11 (1964); Schultz, *Wunderlich Revisted: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 Law Contemp. Prob. 115, 117, 132-33 (1964).

⁹ This and other courts have sometimes overturned Comptroller General's reversals of administrative
(Continued)

case does not, of course, require us to define the full scope of the Comptroller General's authority, but the fact that he undoubtedly has some role under the Wunderlich Act helps to demonstrate that the statute applies to administrative decisions favoring the contractor, as well as those which are adverse. A favorable determination is not removed from all examination by the courts. Issues of law, at the very least, are still open.

We think that the Congress, when it was considering the Wunderlich Act, expressly recognized the jurisdiction of the General Accounting Office to review Disputes clause decisions on questions of fact or law and, moreover, deemed the exercise of such jurisdiction necessary and desirable. This is best demonstrated by a review of the legislative history of the act.

The first section of the Wunderlich Act, 41 U.S.C. 321, provides that:

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of

⁹ (Continued)

decisions sustaining contractors, but the cases have involved errors of law or the absence of circumstances sufficient to invalidate the administrative determination under the prevailing standards. In other words, the Comptroller General has been held wrong in the particular circumstances, not devoid of power over such favorable decisions. See, e.g., *McShain Co. v. United States*, 83 Ct. Cl. 405, 409-10 (1936); *Albina Marine Iron Works, Inc. v. United States*, 79 Ct. Cl. 714, 719-20 (1934).

any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

The Wunderlich Act does *not* provide that administrative decisions on disputed questions are final and conclusive unless determined by a "court of competent jurisdiction" to have been fraudulent or capricious or arbitrary, etc. On the contrary, the act merely provides that "any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary," etc. The Wunderlich Act does not identify the forum in which it is to be determined that a decision is fraudulent or capricious, etc., and the legislative history of the act shows that the Congress deliberately omitted naming the forum.

As H. Rept. No. 1380, 83d Cong., points out, the Senate during the 82d Congress passed S. 2487 but it was too late in the session for the House to act. Section 1 of S. 2487, as passed by the Senate, provided:

That no provision of any contract entered into by the United States, relating to the finality or conclusiveness, in a dispute involving a question arising under such contract, of any decision of an administrative official, representative, or board, shall be pleaded as limiting judicial review of any such decision to cases in

which fraud by such official, representative, or board is alleged; and any such provision shall be void with respect to any such decision which the *General Accounting Office or a court, having jurisdiction*, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by realible, probative, and substantial evidence. [Italic supplied.]

Senate Rept. No. 1670, 82d Cong., 2d sess., which accompanied S. 2487, stated:

The committee wishes to point out with respect to the language contained in the bill, "in the General Accounting Office or a court having jurisdiction," that it is not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office, either in the course of a settlement or upon audit; that the language in question is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.

It should also be pointed out that in speaking of a court "having jurisdiction" the committee intends to negative both the possibility of a construction which would give basis for a contention that this bill itself was granting a court jurisdiction to review Government contracts; and also any construction that would give a basis for a collateral attack on such contracts in a court not having direct jurisdiction of the contract itself.

On June 8, 1953, during the 1st session of the 83d Congress the Senate passed S. 24 which contained the identical language of S. 2487. S. Rept. No. 32 which accompanied S. 24 contained the same statements as those quoted above from S. Rept. No. 1670.

Thereafter, in the 83d Congress, 2d session, S. 24 was passed and became the Wunderlich Act in its present form. This S. 24 omitted the phraseology "the General Accounting Office or a court, having jurisdiction" because of the objections thereto by the Department of Defense and various defense industries. See H. Rep. No. 1380. The present Wunderlich Act language was based on an amendment to the various bills then being considered which was submitted by our Office in the form of a substitute by letter dated December 30, 1953. See H. Rept. No. 1380. The omission of the words "General Accounting Office or a court having jurisdiction" in the substitute draft was predicated upon the conclusion that specific mention of our Office or the courts in the act was unnecessary to confer review jurisdiction either upon our Office or upon the courts. In this connection it should be noted that our Office had never asked for authority it did not have prior to the decision in the *Wunderlich* case. Prior to that decision we had consistently taken the position that Disputes clause decisions on questions of fact or law were not binding on our Office if under settled judicial precedents they would not be binding upon the courts, and that we had full authority to review such decisions under the same standards applied by the courts. Since, as indicated in S. Rept. No. 1670, the specific mention of our Office or the courts in S. 2487 was not intended to change the existing authority of either forum or to grant new jurisdiction to either forum, our Office did not feel that the omission of such mention would or could change the result in S. 24 as finally adopted. Representatives of our Office testified to

that effect on January 21, 1954, during the hearings on the substitute bill S. 24. See pages 36-42, *Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st and 2d sessions, on H.R. 1839, S. 24, H.R. 3634, and H.R. 6946.* Moreover, H. Rept. No. 1380, which accompanied the bill which became law specifically states that:

*** The proposed legislation also prescribes fair and uniform standards for the judicial review of such administrative decisions in the light of reasonable requirements of the various Government departments and agencies, *of the General Accounting Office* and of Government contractors ***

* * * *

The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.

The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office. *It is intended that the General Accounting Office, as was its practice,* in reviewing a contract and change orders for the purpose of payment, *shall apply the standards of review that are granted to the courts under this bill.* At the same time there is no

intention of setting up the General Accounting Office as a "court of claims." *Nor should the elimination of the specific mention of the General Accounting Office in the bill be construed as limiting its review to the fraudulent intent standard prescribed by the Wunderlich decision.* [Italic supplied.]

Finally, see 100. Congressional Record 5510; 5717-5718 (April 26, 1954; April 29, 1954) where the floor leaders on the legislation assured the members of the Senate and the House that the bill was satisfactory to the General Accounting Office. Senator McCarran, who authored the Senate bill, also stated:

*** It is my understanding the Department of Justice takes the view that the House language will accomplish the same purpose as the Senate language [i.e. S. 24 which passed on June 8, 1953 and which was identical to S. 2487]. It is my further understanding that the Comptroller General of the United States has expressed complete satisfaction with the House language, and has declared that in his opinion it will accomplish the purposes sought to be served by the Senate language.

* * * *

Mr. CASE. Can the Senator from Nevada tell us how the assurance was given that the bill was satisfactory to the General Accounting Office? Would the Senator kindly restate the assurance which he voiced with reference to the opinion of the General Accounting Office?

Mr. McCARRAN. The General Accounting Office is satisfied with the language of the House bill. It has assured me of that.

Mr. CASE. The Comptroller General has assured the Senator from Nevada on that point.

Mr. McCARRAN. That is correct; *otherwise I would not care to go along.*

* * * *

Mr. THYE. As I understand, the bill was passed by the Senate, and a similar bill was passed by the House. The only question involved is a modification of the language in the Senate bill, *and the two bills agree in their effect, so to speak?*

Mr. McCARRAN. That is correct.

Mr. THYE. *There is nothing else of a legislative nature involved?*

Mr. McCARRAN. That is correct. [Italic supplied.]

It is thus apparent that in drafting S. 24, as finally enacted, the Congress intentionally refrained from mentioning both our Office and the courts on the assumption that it was unnecessary to do so since both forums already possessed the requisite authority and jurisdiction to review administrative decisions on questions of fact or law. The "standards of review that are granted to the courts" under the Wunderlich Act, and which H. Rept. No. 1380 makes clear are to be exercised by the General Accounting Office, are standards relating solely to decisions on questions of *fact* (i.e. fraud, arbitrariness, capriciousness, not supported by substantial evidence, etc.). Moreover, as that report makes clear, the General Accounting Office is not limited in its review to the fraudulent intent standard prescribed by *United States v. Wunderlich*, 342 U.S. 98. This fraud standard, it should be noted, was, and still is, one of the standards of review applicable to decisions on questions of *fact*. Thus, the conclusion is inescapable that the Congress recognized that our Office did have jurisdiction to review these matters both prior and subsequent to the *Wunderlich* decision, and that the Wunderlich Act was not intended

to affect such jurisdiction. It is equally clear from the legislative history that in exercising such jurisdiction after passage of the act, it was the congressional intent that our Office would apply the same standards in reviewing factual determinations that the courts would apply under the act. In this connection, see also the report prepared for the Select Committee on Small Business, United States Senate, entitled "Operation and Effectiveness of Government Boards of Contract Appeals" by Professor Harold C. Petrowitz, 89th Cong., 2d sess, July 28, 1966, page 29.

The minimal bounds of review by our Office of administrative Disputes clause decisions must be drawn from the terms, history and policy of the Wunderlich Act. "not from the contract clauses which are themselves governed by the statute." *C.J. Langenfelder & Son, Inc. v. United States, supra*. Accordingly, it must be concluded that the language regarding a "court of competent jurisdiction" appearing in the Disputes clause of the S&E contract can have no effect upon the authority of the General Accounting Office to review and question the Examiner's and Commission's findings on questions of fact in this case, since such language goes beyond not only the literal and governing provisions of the Wunderlich Act, but the clear legislative history of what those provisions are intended to mean as well.

Experience in our office has shown that erroneous decisions in favor of contractors have sometimes been made by administrative officials under standard Disputes clauses. Contractors, of course, have a right to judicial review which serves to protect them from administrative decisions that fail to meet the minimum standards set forth in the Wunderlich Act. But how is the Government to be protected from erroneous adverse decisions which fail to meet the Wunderlich standards? As the *Langenfelder* case indicates, Disputes clause decisions favorable

to contractors are reviewable by the courts; however, the crucial question here, which S&E overlooks, is not whether the Government has the *right* to judicial review of adverse decisions but in what manner and under what procedure can the Government get to the courts for such a review? Since Disputes clause decisions are those of the head of the department or agency involved appeal by the agency would be highly unlikely. The Court of Claims recognized this unlikelihood in *Langerfelder*. See footnote 7 of that decision quoted above. Moreover, in view of the lack of judicial pronouncement on the point, there may be a question whether the Government has standing to file an appeal directly with the courts challenging an adverse decision by one of its agencies under a Disputes clause. In that connection, see report prepared for the Select Committee on Small Business, U.S. Senate, 89th Cong., 2d sess., entitled "operation and Effectiveness of Government Boards of Contract Appeals," by Professor Harold C. Petrowitz, July 28, 1966, pages 29-30. It is obvious, therefore, that unless this Office raises an objection, either upon its own initiative or upon a submission by an accountable officer having responsibility for approval or payment of the award, and directs the department head not to make payment under a particular decision, adverse decisions that fail to meet the Wunderlich standards will go undetected and unremedied. Thus, while S&E contends that the Comptroller General should not assume jurisdiction to consider this case, "thereby allowing the appeal to proceed through the proper and ordinary disputes Channel," such contention ignores the obvious fact that where, as here, the disputes procedure has been exhausted in the contracting agency, there would be no further channel open to remedy an erroneous Disputes clause decision against the Government's interest unless our Office exercised its traditional jurisdiction to question such a decision.

The argument has been made that the Government is not in need of the protection afforded by judicial review since the decisions to be reviewed are rendered by Government officials. We think that such an argument overlooks the obvious fact that Government officials can err in favor of contractors as well as in favor of the Government. The argument also ignores the fact that contract disputes hearings are adversary proceedings in which the hearing tribunal should be impartial and independent. A tribunal's decision must meet the high standards of finality prescribed in the Wunderlich Act. To view these tribunals purely as agents of the Government would reduce them to a subservient status with the implication that they are not in a position to exercise independent, fair and impartial judgment. The contract appeal tribunals have become institutionalized and have a long and honorable history of fair and impartial adjudication of disputes. Like any tribunal, judicial or administrative, they may commit errors of law or fact but no responsible critic today would contend that they are mere creatures of a department or agency and that in the hearing of a case they represent the department's or agency's interest. At the same time, it must not be overlooked that these dispute-determining tribunals or officers are created solely by administrative action, have no statutory powers, and can exercise only such authority as is delegated to them by the agency or department heads who create them. In the end, their power can be no greater than that of their creator and their actions can have no greater effect than would the action of the agency head. Since the primary objective of the Budget and Accounting Act, 1921, was the creation of an authority outside the Executive, responsible only to the Congress, to check and prevent administrative action contrary to statutory fiscal limitations imposed by the Congress, it seems imperative, especially in view of the billions of dollars annually expended under Federal con-

tracts, that our Office take the action needed to protect the Government's interest whenever administrative Disputes clause decisions are brought to our attention which, in our opinion, fail to meet the finality standards of the Wunderlich Act. In that connection, the duty of our Office was spelled out long ago by the Court of Claims in *Longwill v. United States*, 17 Ct. Cl. 288 (1881) and *Charles v. United States*, 19 Ct. Cl. 316 (1884). The court, in the latter case, stated:

When, in the course of the examination of accounts in the Departments, suspicions are aroused or doubts are entertained as to the validity of the demands of claimants, the parties may be sent to this court to prove their cases under the rules and forms of law, upon legal and competent evidence, or their demands may be rejected altogether, leaving the claimants to prosecute them here upon their own voluntary petitions, if they so desire. That is the main protection which the accounting officers can secure for themselves and for the Government in the case of claims of doubtful validity in fact or in law, and especially of claims as to which there is a reasonable suspicion of fraud, irregularity, or error.

While it is recognized that the *Longwill* and *Charles* cases did not involve claims presented under the Disputes clause procedure, nevertheless, the court's statement on the duty of this Office as to the action to be taken when doubtful claims are brought to our attention is as sound today as it was then, especially when it is remembered that, by act of the Congress, Disputes clause decisions on questions of law are not final and that decisions on questions of fact are final only if they meet the Wunderlich Act standards of review.

In regard to S&E's assertion that the exercise of review functions in this case would make our Office another "Court of Claims" it need only be noted that, while our decision making function is at least quasi-judicial, such a result is neither intended nor possible. The Court of Claims, like any duly constituted court, has the authority and power to render decisions and judgments which are binding and conclusive upon both parties to a suit properly before it. The General Accounting Office is not a court and its decisions under the Budget and Accounting Act, 1921, have no binding effect upon private parties or in judicial proceedings. Such parties have always had the right to pursue any judicial remedies which may be available to them regardless of any previous decisions rendered by the Comptroller General. This right to a judicial remedy exists whether the claim which has previously been denied by the General Accounting Office is one arising outside the Disputes clause or under the Disputes clause. Our function under the Wunderlich Act therefore is not that of another "Court of Claims" which has power to conclusively bind the contractor as well as the Government. Rather, as the Congress intended, our role under the Wunderlich Act is precisely what it has always been even before passage of the act—a role, as spelled out in the *Longwill* and *Charles* cases, *supra*, which, through intervention, makes it possible for the Government to receive the protection afforded by a review in the Court of Claims or any other court having jurisdiction.

Contrary to the assertion in S&E's brief of July 20, 1966, our Office has exercised its jurisdiction to review administrative Disputes clause decisions on questions of fact on a number of occasions. For example, see 43 Comp. Gen. 1; 35 *id.* 512; B-142040, August 27, 1962; 45 Comp. Gen. 693; B-144847, February 14, 1961. See also *McShain Co. v. United States*, 83 Ct Cl. 405 and

Albina Marine Iron Works, Inc. v. United States, 79 Ct. Cl. 714 which are cited in *C.J. Langenfelder, Inc. v. United States*, footnote 9, *supra*. Both *McShain* and *Albina Marine Iron Works* involved reversals by our Office of administrative decisions on questions of fact. In explaining its subsequent overruling of our decisions in those two cases the Court of Claims in *Langenfelder* stated: "In other words, the Comptroller General has been held wrong in the particular circumstances, not devoid of all power over such favorable decisions."

In view of these considerations, we think that action by our Office in this case need not be predicated upon, or circumscribed by, a "request" for our "review of, or concurrence in" the decision reached by the Hearing Examiner as reviewed and modified by the Commission. Nor, for that matter, as indicated above, will our decision be limited to the three issues raised by you with respect to the voucher. Your request for decision brings into issue nearly all of the more fundamental questions decided by the Hearing Examiner, but even if it did not, our responsibility under law would not be discharged were we to ignore a questionable claim allowance once brought to our attention.

We realize, of course, that the scope of our review in this case is broad and far reaching. In view of the fact that our decision may give rise to further litigation entailing further effort and expense to both parties in the dispute, our conclusions in this case were not reached lightly. We recognize that due regard must be given to the Hearing Examiner's opportunity to judge the credibility of the witnesses who testified at the hearing. This factor was carefully considered by our Office. However, upon comparison of the testimony of various witnesses from both sides, as recorded in the hearing transcript, with the documentary evidence (e.g. the daily logs

of the work, minutes of the weekly meetings, correspondence between the parties, progress pictures and official weather data), we have concluded that any possible effect of the Examiner's opportunity to judge the credibility of witnesses was more than outweighed by the inconsistencies and contradictions revealed by our comparison. Our review of the record reveals that these last mentioned documents directly contradict the testimony of various S&E witnesses during the hearing in several vital and controlling areas of the issues presented. It is important to note in that connection, that the documentary evidence referred to was prepared or compiled contemporaneously with the events described therein and contemporaneously with the construction work as it progressed.

It is contended by S&E's Counsel that our Office does not have the facilities to conduct administrative hearings in Disputes clause cases. It is noted, however, that under the rule set forth in the *Bianchi* case, *supra*, the review of a departmental decision on a question of fact arising under a Disputes clause must, under the Wunderlich Act, be confined to consideration of the record before the department and no new evidence may be received on such questions. Thus, even if we were equipped to conduct hearings and wished to grant a *de novo* review on this case, the *Bianchi* rule would not permit it. It should also be noted that S&E was not precluded from presenting any legal arguments pertaining to this case that it wished to submit, as fully as it could have done in a judicial review. S&E availed itself of this opportunity and submitted legal briefs to our Office by letters dated May 15, August 17, September 17, 1964, June 1, 1965, and July 20, 1966. The contracting officer's attorney also submitted several legal briefs. All of these briefs were carefully considered. It might also be mentioned that the S&E June 1, 1965, and July 20,

1966, briefs are indicative of the seriousness with which we view this case since these briefs are in response to a proposed draft of decision by this Office, and its release for comment to the interested parties is a procedure normally not followed in this type of case. In view of the voluminous record, and also the complexities of the issues involved, together with the fact that many factual as well as legal questions are involved, we felt that we could do no less than offer it for comments or objections. The draft document, contrary to S&E's assertion, is not a redetermination of the facts but a review of the record before the Hearing Examiner to determine whether his findings, as modified by the Commission, are entitled to finality under the Wunderlich Act standards.

The hearing before the Hearing Examiner was conducted over a period of 13 days in Idaho Falls, Idaho, and in Washington, D.C., during the months of December 1962 and January 1963. Extensive testimony was presented by witnesses from both sides—the hearing transcript ran to a length of 2442 pages. Numerous documents and data were introduced into evidence—25 by the Government, designated as 1 through 25, and 30 by S&E, designated as A through DD. In addition, 5 exhibits were received in evidence which were designated as exhibits of the Hearing Examiner. The exhibits on both sides were varied and complete, covering nearly every aspect of the issues involved. They included, among other things, periodic photographs of construction progress, minutes of weekly construction meetings, daily logs of the work, Department of Commerce local climatological data, contract drawings and correspondence between the parties.

Because of the import of the decision of the United States Supreme Court in *United States v. Carlo Bianchi and Company, Inc.*, 373 U.S. 709 (1963), a few com-

ments on the nature of the evidence in the case transmitted to this Office, and upon which our review was based, appear warranted. In the *Bianchi* case, the Supreme Court held that, apart from questions of fraud, the review of a departmental decision on a question of fact arising under a Disputes clause must, under the Wunderlich Act, be confined to consideration of the record before the department, and that the reviewing court may not receive new evidence on such questions. See also the recent decisions by the Supreme Court in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 and *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424. At the outset it should be noted that no new evidence, not previously considered by the Hearing Examiner and/or Commission, was considered by our Office in the review of this case. However, a few of the exhibits which were presented in evidence at the hearing were not before us for consideration. They consist of the following: contracting officer's exhibit 7; S&E exhibits B, N, O, and X, and Hearing Examiner exhibits 1, 4 and 5. However, we do not think, for the reasons stated below, that their absence from the record before our Office could affect, in any way, the completeness of our review or the validity of our conclusions.

S&E exhibit B consisted of a scale model of the project which, during the early portion of the hearing, was assembled, piece by piece, by S&E witnesses to illustrate the steps and sequence of construction. The model was built by S&E after completion of the contract for the purposes of the hearing and, in and of itself, has no probative value as evidence of what transpired between the parties during the course of the contract. While the model may have been useful to acquaint a person who was not present at the site during the construction period with the nature, size and elements of the project, other evidence, of more probative value, is

available for that purpose. This other evidence consists of photographs taken at regular intervals during the construction, minutes of weekly meetings, contract drawings and the daily logs of the work. For these reasons and, also, because of the practical difficulties involved in moving the model from the AEC headquarters building to this Office, we did not request submission of the model here.

A large portion of the hearing was devoted to the claim of impossibility of performance. Most of the evidence on this claim consisted of expert testimony based on an analytical system, called the "critical path method," which is used to determine necessary time for construction and which we need not go into here. Contracting officer's exhibit 7, S&E exhibits N and O, and Hearing Examiner's exhibits 1, 4 and 5, are related to the impossibility claim. As the Hearing Examiner recognized, his authority to grant relief on a claim under the Disputes clause must be based on some provision in the contract providing for such relief. See *Utah Construction & Mining Co. v. United States*, 168 Ct. Cl. 522, affirmed on this point 384 U.S. 394. While a claim of impossibility may be set up as a defense in an action for breach of contract, there was no authority under the contract to grant affirmative relief on such a claim. The Examiner rejected S&E's claim for time extensions because of impossibility of performance "as a matter of law." We are in complete agreement with the legal soundness of the Examiner's conclusion in this regard. Since the evidence and exhibits cited above related to a claim not properly presentable under the Disputes clause, they were deemed immaterial for consideration in our review.

S&E exhibit X was an analysis prepared by S&E showing the cost of providing 64 carpenters to man the job which the Government witness, Commander Anderson, who was the Contracting Officer's Representative at

the site, had earlier testified was the proper size force for the project. When this exhibit was offered in evidence, the attorney for the contracting officer objected on the ground that it was irrelevant. The issue of the number of carpenters that should have been used on the job will be discussed later. In any event, however, the data and cost figures contained in exhibit X were fully disclosed and discussed by Mr. Elder in his testimony during the hearing (pp. 2388-2391 of the Transcript). For these reasons, it is not felt that the physical presence of exhibit X is necessary for consideration in our review.

Our review of the Examiner's decision, as modified by the Commission, has been made on the basis of the entire record, with the exceptions noted above. The phrase "substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Edison Company v. National Labor Relations Board*, 305 U.S. 197, 229. In enacting the Wunderlich Act it is clear that Congress intended to adopt the *Edison Company* case definition of "substantial evidence." See H. Rep. No. 1380, page 4. However, in applying the "reasonable mind" criterion of the *Edison Company* case it has been held that the record made before the deciding official or body must be considered as a whole. See *Lee Hoffman v. United States*, 166 Ct. Cl. 39, 51, where the court said:

Defendant urges that the criterion set forth in *Bateson Co. v. United States*, 149 Ct. Cl. 514, 518 (1960) that substantial evidence means "such evidence as might convince a reasonable man, to support the conclusion reached by the agency officials," is fully met in this case. Even were we to assume that there is some evidence which, standing alone, might convince a reasonable man to support the

Board's conclusion, this, in and of itself would not be sufficient here. As we stated, in *Williams v. United States*, 130 Ct. Cl. 435, 441, 127 F. Supp. 617, 619, *cert. denied*, 349 U.S. 938 (1955):

"The fact that there is evidence, considered of and by itself, to support the administrative decision is not sufficient where there is opposing evidence so substantial in character as to detract from its weight and render it less than substantial on the record as a whole."

For other cases in accord with the above ruling see *United States v. Hamden Co-operative Creamery Company Inc.*, 185 F. Supp. 541, affirmed 297 F.2d 130; *Rheem Manufacturing Company v. United States*, 153 Ct. Cl. 465; *River Construction Corporation v. United States*, 159 Ct. Cl. 254; *Fehlhaber Corporation v. United States*, 138 Ct. Cl. 571, *cert. denied* 355 U.S. 877; *Fox Valley Engineering, Inc. v. United States*, 151 Ct. Cl. 288; and *Russel H. Williams, et al. v. United States*, 130 Ct. Cl. 435. In the last cited case the Court of Claims stated (pp. 440, 441):

"We are satisfied from the evidence and have found as a fact that the decision of the head of the department was not supported by substantial evidence. In reaching this conclusion we have considered the evidence on both sides in order to determine whether it appears that the evidence in support of the administrative decision can fairly be said to be substantial in the face of opposing evidence. See *Willapoint Oysters v. Ewing*, 174 F.2d 676, *certiorari denied* 338, U.S. 860. In a recent decision by the Supreme Court, *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S.

474, 487, the Court made the following statement with respect to the rule relating to substantiality of evidence to support an administrative decision:

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation [Administrative Procedures Act and Taft-Hartley Act] definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record."

The fact that there is evidence, considered of and by itself, to support the administrative decision is not sufficient *where there is opposing evidence so substantial in character as to detract from its weight and render it less than substantial on the record as a whole.*

As we view the evidence, it is difficult to see how it could be said that there was substantial evidence to support the decision made by the contracting officer and the head of the department in the face of the opposing evidence * * * [Italic supplied.]

See, also, the *Fehlhaber Corporation* case, *supra*, at page 578, where the Court of Claims observed:

In this light, the decision of the Corps of Engineers Claims and Appeals Board is not

supported by substantial evidence and is in fact contrary to the overwhelming weight of the evidence as the ensuing discussion herein will point out * * *

Compare the statement in an opinion of the Trial Commissioner, adopted by the Court of Claims in a *Per Curiam* opinion, in the *Fox Valley Engineering, Inc.* case *supra*, (p. 241) that a decision of the Armed Services Board of Contract Appeals was "grossly erroneous, and is not substantially supported by the credible and probative evidence."

In our considered opinion, for the reasons set forth hereafter, the decision rendered by the Hearing Examiner, as modified by the Commission, fails in several vital respects to meet the standards set forth in the Wunderlich Act as prerequisite to conferring finality upon such decision. With respect to those claims submitted by S&E which involve questions of fact, we think that the Examiner's decision is not supported by substantial evidence.

We also think the Examiner's decision contained serious errors of law, as will be noted hereinafter.

In regard to the evidence relied upon by the Examiner in support of his decision, we believe, to borrow the words of the Court of Claims in the *Williams* case, *supra*, that "there is opposing evidence so substantial in character as to detract from its weight and render it less than substantial on the record as a whole." To put it another way, we do not believe that the evidence in support of the Examiner's conclusions when considered together with the other evidence of record, is "such relevant evidence as a reasonable mind might accept as adequate to support" such conclusions. It is on the basis of these criteria that we have reviewed the Examiner's decision to determine whether it is supported by substantial evidence. Accordingly, when S&E's individual claims are

discussed hereinafter and we conclude that the Examiner's findings on factual questions are not supported by "substantial evidence" our conclusions result from application of the above criteria, as laid down in the *Edison Company* and *Williams* cases. We cannot help but feel that in reaching his decision, the Examiner either ignored, overlooked, or failed to give proper weight to the vast amount of uncontroverted evidence introduced by the Government in the form of testimony, official weather data, daily logs of the construction work kept by both parties, official minutes of weekly construction meetings, and correspondence between the parties on the various issues which arose from time to time. The latter four categories of evidence, in our view, have especially significant probative value since these documents were compiled or composed contemporaneously with the construction work as it progressed and they were not challenged by S&E during the hearing as being inaccurate, misleading or erroneous. As noted earlier, the testimony of S&E's witnesses is contradicted by this unchallenged documentary evidence in several vital respects. It is also our belief, as will be demonstrated hereafter, that the Examiner failed to adequately evaluate the evidence introduced by S&E, since a close inspection and analysis of that evidence indicates much of it is general and imprecise in nature and in some important instances is internally contradictory and inconsistent.

APPENDIX D

1. The Act of May 11, 1954, 68 Stat. 81 (The Wunderlich Act), 41 U.S.C. 321-322) provides:

§ 321. *Limitation on pleading contract-provisions relating to finality; standards of review.*

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract; shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. *Contract-provisions making decisions final on questions of law.*

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2. The contract provided in pertinent part:

"6. *Disputes*

"(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is

not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

“(b) This ‘Disputes’ Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

MAR 29 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1998~~

70-88

S & E CONTRACTORS, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Claims

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE
IN SUPPORT OF THE PETITION**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

No. 1398

S & E CONTRACTORS, INC., *Petitioner,*
v.
THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Claims

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE
IN SUPPORT OF THE PETITION**

PRELIMINARY STATEMENT

This brief is filed by the American Bar Association as *amicus curiae*, pursuant to ~~the~~ written consent of the Petitioner and Respondent which are on file with the Court.

OPINION BELOW

The opinion of the Court of Claims and the two dissenting opinions are reported at 433 F.2d 1373 and are also reproduced at pages A-1 through A-44 of Appendix A of the Petition for a Writ of Certiorari. It was a 4-3 decision.

QUESTIONS PRESENTED

This controversy concerns whether the Court of Claims has correctly read and applied the "Wunderlich" or "Anti-Wunderlich" Act,¹ 41 U.S.C. §§ 321-22. That Court extended to the Government the same right to obtain judicial review of Government procurement agency decisions favorable to contractors under the standard Government contract "Disputes" clause, as that Act affords contractors who are aggrieved by such agency decisions. The Court of Claims in this case has thus opened the door to full judicial review of the decision of the Government procurement agency, the Atomic Energy Commission, favorable to Petitioner, even though the Atomic Energy Commission has never repudiated or disavowed it.² Thus the ques-

¹ So popularly named because of its legislative purpose to overturn the decision of this Court in *United States v. Wunderlich*, 342 U.S. 98, 96 L.Ed. 113 (1951). See, e.g., H.R. Report No. 1380, 83d Cong., 2d Sess. 1 (1954) ("The purpose of the proposed legislation, as amended, is to overturn the effect of the Supreme Court decision in the case of *United States v. Wunderlich* (342 U.S. 98), rendered on November 26, 1951, under which the decisions of Government officers rendered pursuant to the standard disputes clause in Government contracts are held to be final absent fraud on the part of such Government officers.")

² The Commission's decision was administratively set at naught by the Comptroller General who ruled Petitioner was not entitled to recovery on its claims and that the Commission decision to the

tions presented, and the considerations pertinent to the granting of the writ, include the following:

1. Does the Wunderlich Act require that the courts accord the Government judicial review of Government procurement agency decisions favorable to contractors under the standard "Disputes" clause, coextensive with that made available to contractors by that Act?

2. Does the standard "Disputes" clause of Petitioner's contract, consistent with the Wunderlich Act, make Government procurement agency decisions under that clause favorable to Petitioner binding on the Government so as to foreclose judicial review thereof under the criteria of that Act?

3. Does the decision of the Atomic Energy Commission favorable to Petitioner under the standard "Disputes" clause of Petitioner's contract constitute or amount to a contractual agreement on, or settlement of, the dispute that is binding on the Government, irrespective of the Wunderlich Act, in the absence of allegations of fraud, bad faith, or illegality?

4. Do the answers to the foregoing depend on whether the Government procurement agency has, or has not, as in this case, disavowed, repudiated, or refused to carry out its decision favorable to Petitioner?

contrary was not entitled to finality under the Wunderlich Act, with the result that the Commission's decision was never implemented by any payment to Petitioner. See *Petition for Certiorari* at App. C. In the court below the Department of Justice asserted the same conclusion on its own behalf. See dissenting opinion below of Judge Skelton, *Petition for Certiorari*, App. A at A-15 *et seq.*

THE STATUTES AND CONTRACTUAL PROVISIONS INVOLVED

1. The Act of May 11, 1954, 68 Stat. 81 (The Wunderlich Act), 41 U.S.C. §§ 321-322) provides:

“§ 321. *Limitation on pleading contract-provisions relating to finality; standards of review.*

“No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, *shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.* (Emphasis added.)

“§ 322. *Contract-provisions making decisions final on questions of law.*

“No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.”

2. The standard “Disputes” clause of Petitioner’s contract provided as follows:

“*Disputes*

“(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting

Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission or its duly authorized representative for the determination of such appeals *shall be final and conclusive* unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. *Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.*

“(b) This ‘Disputes’ Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.” (Emphasis added.)

3. The pertinent provisions of the Budget and Accounting Act concerning the General Accounting Office, 31 U.S.C. §§ 71, 74, 82d, and of the statutes relating to the Department of Justice, 28 U.S.C. §§ 516, 519, are set forth in Appendix A hereto.

THE INTEREST OF THE AMERICAN BAR ASSOCIATION

The American Bar Association strongly urges the granting of the Petition for a Writ of Certiorari in this case.

By overturning some 45 years of administrative practice of according finality to decisions of procure-

ment agencies favorable to contractors, the decision below appears to threaten the process of settlement of disputes between the Government and its contractors, and to undermine the finality of settlements made (absent allegations of fraud, bad faith or illegality). Because of the vast scale of Government procurement and the obvious public importance of encouragement of the settlement of Government contract disputes, the American Bar Association urges the Court to grant the writ.

The bases of these concerns are illuminated by the dissenting opinions below. Thus, Judge Collins wrote in part:

"A brief look at the realities of the disputes procedure reveals that Congress could never have intended that the [Wunderlich] Act be read as the court reads it. When a dispute arises between a contractor and the Government, the 'disputes' clause sets out clearly the procedure to be followed. First, the parties may voluntarily settle the dispute. If they do, that is the end of the matter. If no settlement is reached, the disputed matters are decided by the agency's contracting officer. If the contractor does not appeal to the agency from the contracting officer's decision within the prescribed time, that, again, is the end of the matter. If, however, the contractor does appeal to the agency, then, according to the court, a decision rendered by the agency or its board favorable to the contractor is not the end of the matter; the agency is free at any time to disavow or repudiate its own decision, thereby forcing the contractor to sue. *The anomaly created by the court's decision is too obvious to need elaboration.* While an agency will still be bound by the decisions of its contracting officers, it will not be bound by deci-

sions made at the highest level." (See Petition for Certiorari; App. A at A-41, 42; emphasis added, footnotes omitted)

Judge Collins' dissent next pointed out an example of the mischief of the Government's disavowal of its decisions favorable to contractors:

"The suggestion that the Government, after deciding a contract dispute with one of its contractors in favor of the contractor, can then promptly disavow that decision carries with it an enormous potential for mischief. It means that the Government, after deciding that its contractor's claim is meritorious, based on a *preponderance* of the evidence presented to it, can then turn around and reject the claim because there is *substantial* evidence (*i.e.*, less than a preponderance) to support the opposite result. The majority opinion puts a tremendous economic burden on Government contractors who are now faced with the prospect of prolonged judicial proceedings in order to collect funds to which the agencies have already found them entitled. After today's decision the Government would be foolish to pay *any* board awards." (*Id.* at A-43; emphasis in original.)

Finally, Judge Collins notes the devastating effect of the court's having destroyed the finality of agency board decisions favorable to contractors:

"Moreover, the court's decision will utterly defeat the purpose and utility of the 'disputes' clause, which has served admirably over the years, and will seriously hamper the Government in virtually all its activities whenever it is forced to call on the resources of private firms. The purpose of the clause has been to promote the expeditious performance of Government contracts. By

destroying the finality of board decisions favorable to contractors, the court has assured that the performance of Government contracts will be anything but expeditious. Protracted and expensive litigation has never been known for its beneficial effect on contract performance." (*Id.* at A-43.)

Also pertinent to the interest of the American Bar Association as *amicus curiae* is the concern over the role played by the Department of Justice in this case as expressed by the dissenting opinion of Judge Skelton, joined by Chief Judge Cowen and by Judge Collins, who wrote in part (See Petition for Certiorari, App. A at A-31 - 32):

"The Attorney General, in effect, urges that the parties here are entitled to their 'day in court' on the finality issue and on the merits. At first blush, this is appealing to the American sense of justice and fair play. However, when it is applied to the facts and procedures in this case, it loses its appeal. The plaintiff does not want a hearing in court. All he wants is the enforcement of the decision and to be relieved of interdepartmental squabbling over powers and duties. The AEC, the only other party to the suit, has had the questions involved in the case heard four times already, by those authorized by the contract to hear them, namely, the contracting officer, the examiner and twice by the AEC itself, all of whom represented the Government. The AEC has not asked for a court hearing on whether or not its decision is final nor on the merits, and, if it could speak out, it would no doubt oppose it. That only leaves the Attorney General, who is not a party and who appears in the case as an attorney. He wants a hearing in court to enable him to assert a theory contrary to the decision of his client, the AEC. His argument is unpersuasive."

Judge Skelton then noted the harm to the disputes process from permitting the Attorney General to proceed on his own:

"The effect of the majority opinion is to allow the Attorney General *sua sponte* to appeal from the decision of another executive agency adverse to the government for the purpose of overturning it, and, by dicta, authorizes him to similarly appeal from an adverse Board decision for the same purpose. Such a procedure imposes an additional layer of bureaucratic red tape that contractors must overcome before they receive final decisions along the administrative trail on their claims under the disputes clause in government contracts. It easily adds from one to three years, and perhaps more, to the already extended period of time for processing a contractor's claim. Under such a system, how can a knowledgeable contractor afford to do business with the government?" (*Ibid*; emphasis in original.)

There thus appears to be at stake large issues of public importance which also touch upon the business required to come before the Court of Claims and the other Federal courts in these times of clogged court backlogs. If this case can properly be viewed as one in which Petitioner and the Government acting through the agency empowered to contract with Petitioner have settled, or agreed upon, Petitioner's entitlement to recover on its claims, then this case (and others like it)³ would appear to have no business in the courts on judicial review under the criteria of the Wunderlich Act. The interest of the American Bar Association thus suggests that this Court should determine

³ We are advised that at least two other cases now pending in the court below raise substantially similar issues.

whether that Act requires such an expenditure of judicial resources for the reasons indicated.

STATEMENT

In August 1961 Petitioner, as the lowest responsible bidder after formal advertising for bids, was awarded a contract by the Atomic Energy Commission to construct a testing facility at the National Reactor Test Station in Idaho. Under the original contract, the work was to be completed by February 6, 1962, and Petitioner was to receive \$1,272,000 as the fixed contract price. Various contract modifications increased the contract price to \$1,364,794.70 and extended the work until March 25, 1962. Petitioner completed the work, and it was accepted by the Government in June 1962.

Petitioner submitted seven claims⁴ under the contract to the Contracting Officer who denied all of them under the contract's "Disputes" clause.⁵ Petitioner then appealed the denial of the claims to the Atomic Energy Commission which referred them to a Hearing Examiner of the agency for the holding of a hearing and the preparation of a report.⁶ By decision dated June 26, 1963, the Hearing Examiner found that Petitioner was entitled to recover on the seven claims in issue. This decision was substantially affirmed by the Atomic Energy Commission itself on May 13, 1964, as

⁴ Originally, Petitioner presented nine claims totalling approximately \$1,950,000. Only seven of them were urged below.

⁵ The text of this clause appears at pp. 4, 5, *supra*.

⁶ At that time the Atomic Energy Commission had not established a Board of Contract Appeals to act for it on contract disputes.

shown by its Order entered that date which provided as follows:

"The proceeding is remanded to the contracting officer with instructions to proceed to final settlement or decision in accordance with the decision of the hearing examiner dated June 26, 1963, as modified by our order of November 14, 1963, and by this decision."⁷

Indeed, this Order largely repeated the Commission's previous Order of November 14, 1963 directing the contracting officer "to effect promptly equitable adjustments and payments to which the Appellant [the Petitioner] is entitled."⁸

As shown by the report of the Commissioner to the Court of Claims (Petition for Certiorari, App. B., at B-20 - 21), the following events ensued:

"Subsequently, on March 4, 1964, a certifying officer in the employ of the Commission requested advice from the General Accounting Office ('GAO') with respect to the certification of a voucher for the making of a payment in the amount of \$32,297.73 to the plaintiff under the contract. The amount set out in the voucher was said to represent three sums withheld from the plaintiff, i.e., \$22,280 withheld because the plaintiff allegedly owed such amount to a supplier of aggregate, \$8,366.19 withheld because of the Government's possible liability to another contractor, and \$1,651.54 withheld because of an alleged indebtedness by the plaintiff to still another contractor for telephone services.

"It will be noted that the voucher which the certifying officer submitted to the GAO for advice

⁷ See Petition for Certiorari, App. A, at A-16.

⁸ See Petition for Certiorari, App. B, at B-20.

covered two of the items that had been involved in the plaintiff's 'retainage' claim before the hearing examiner and the Commission (although there was a variance in the amount of one of these items), but it did not cover any proposed payment of any of the seven claims that are involved in the present review proceedings.

"On December 5, 1966, the GAO advised the certifying officer in decision No. B-153841 (46 Comp. Gen. 441) that it would be improper to certify the voucher which had been submitted to the GAO, because (according to the GAO) the plaintiff did not have a valid claim for any additional compensation under the contract.

"The GAO reviewed at great length the hearing examiner's report and the Commission's actions on all of the plaintiff's claims, including the 'access,' 'concrete,' 'steam,' 'weather,' 'acceleration,' and 'backfill' claims, which are summarized in parts II-VII of this opinion. The GAO expressed the opinion that the administrative decisions favorable to the plaintiff in connection with these claims were not supported by substantial evidence."

"Relying on the opinion expressed by the GAO, the Commission thereafter refused to take any further action on the plaintiff's claims. As a consequence, the plaintiff has never received the administrative relief which, according to the Commission's decisions, the plaintiff was entitled to receive on the claims described in parts II-VII of this opinion." (Footnote omitted).

Thereafter, on April 11, 1967, Petitioner commenced this action in the court below. On November 30, 1970,

* The GAO further asserted that "The Examiner's decision contained serious errors of law." See Petition for Certiorari, App. C at C-47.

the court below decided that the Government was entitled to judicial review, under the criteria of the Wunderlich Act, of the merits of the entitlement decisions of the Atomic Energy Commission favorable to Petitioner on its claims. In its present posture below, the case is on remand to the Commissioner of the Court of Claims "for his consideration and report on the various claims under Wunderlich Act standards."¹⁰ As pointed out in the Petition for Certiorari, as "a consequence of the Government's delay in payment in this case, the Petitioner has been unable to continue in business."¹¹

REASONS FOR GRANTING THE WRIT

- **The Strongest Reasons of Public Policy Suggest that the Court Should Grant the Writ To Clarify the Roles of the Courts, the Contracting Agencies, the Department of Justice, and the General Accounting Office in Determining the Contractual Finality To Be Accorded to Disputes Clause Decisions at the Agency Head Level Favorable to Contractors.**

The Court should grant the writ in this case to resolve the competing contentions as between the contractual finality to be accorded administrative settlements of contract disputes at the agency head level and payment thereon on the one hand, and the contention that Congress has mandated that such settlements (and payments) when resulting from decisions at the agency head level favorable to contractors should be made subject to judicial review at the Government's election (even by the Attorney General *sua sponte*).

¹⁰ See Petition for Certiorari, App. A, at A-14.

¹¹ *Id.* at 10.

Four judges of the court below were of the view that the Wunderlich Act and its history manifested a Congressional purpose to accord the Government the right to full judicial review of its own agencies' decisions under the criteria of that Act. Three judges of that court dissented from that pronouncement.

1. The Holding Below Has No Support in the Words of the Statute; the Wunderlich Act Was Only a Command to the Government Not To Plead the Disputes Clause as "Limiting" Judicial Review to Fraud Cases. It Conferred No Right of Judicial Review on the Government:

The holding of the court below that the Wunderlich Act confers a right of judicial review on the Government, coextensive with that conferred on the contractor, simply has no support in the language of the statute. For the language of the statute does not purport to confer upon the Government a right of judicial review, or a right of refusal to pay contractors pursuant to Disputes clause decisions favorable to contractors. Rather, the only factual situation to which the statute, on its face, addressed itself, in its context of overruling this Court's decision in *United States v. Wunderlich*, 342 U.S. 98, 96 L.Ed. 113 (1951), was its command to the Government that "no provision of any contract entered into by the United States . . . shall be pleaded . . . as *limiting judicial review* . . . to cases where fraud . . . is alleged . . ." in a suit by a contractor on such a contract. (Emphasis added.)

Conversely, the contractor can never be in a position where, in a suit brought by him—which is all we are talking about—he could plead the disputes clause, and an implementing Board decision, as "limiting judicial review" to cases where fraud is alleged. Indeed, his objective is the very reverse. His objective, in a suit

brought in the Court of Claims, under the Wunderlich Act, must necessarily be, not to "limit" judicial review, but to seek the fullest possible judicial review.

Stated otherwise, the only situation to which the statute is addressed, in its express purpose of delimiting the finality of disputes clause decisions, is the situation where the contractor—and not the Government—seeks judicial review. Hence, it does not reach the point of purporting to confer a right of judicial review on the Government.

2. The Interpretation of the Wunderlich Act by the Court Below Is Anomalous Since It Accords Greater Contractual Finality to Decisions of Subordinate Contracting Officers Favorable to Contractors Than It Does to the Same Decisions Rendered at the Agency Head Level:

The standard "Disputes" clause as incorporated in Petitioner's contract¹² provides that, unless the contractor appeals from a decision of the contracting officer to the agency head within the time provided, that decision is final and conclusive as to questions of fact. The Wunderlich Act by its terms affords no basis for judicial review of contracting officers' decisions, in the absence of such an appeal first having been taken.

When the contracting officer and the contractor resolve a dispute by agreement, there is ordinarily no occasion for the issuance of a decision by the contracting officer. Rather, the agreement resolving the dispute, if time or money are involved, is usually the subject of a contract modification executed by the parties. To such agreements (whether evidenced by a contracting officer's decision or by a supplemental agreement),

¹² See pp. 4, 5, *supra*.

the Wunderlich Act by its terms has no application. As pointed out in Judge Collins' dissent quoted above, the anomaly, created by the court below, becomes evident when the Wunderlich Act is read as enabling the Government to obtain judicial review of decisions at the agency head level favorable to contractors when, plainly, that course is not open to the Government when the contractor obtains the same favorable decision at the subordinate contracting officer level. Stated otherwise, since a "Disputes" clause decision on a question of fact favorable to a contractor at the contracting officer level is contractually binding on the Government unless the contractor appeals to the agency head, it is nonsense to read the Wunderlich Act as denying any less contractual finality to the same decision rendered at the agency head level which is acceptable to the contractor.

3. To Refuse Payments Ordered as an Outcome of Appeal Proceedings Under the Disputes Clause Constitutes a Breach of Contract, Inasmuch as the Government Is Given No Contractual Right Under the Disputes Clause to Judicial Review of Decisions Favorable to the Contractor:

The entire procedure under the standard "Disputes" clause is contractual in nature, and the Wunderlich Act does not alter this fact since it was not a jurisdictional statute. It did not confer any additional authority on the heads of agencies, and it did not revise the basic jurisdiction of the Federal Courts.

Thus we necessarily fall back on the "Disputes" clause. And the "Disputes" clause in Government contracts represents a substantial departure from the traditional methods of resolving controversies between private parties, inasmuch as determinations under the

clause are made by a representative of only one of the contracting parties—the Government. There is a noteworthy possibility of conflict of interest on the part of such Government representative, which is inherent under the clause. This, however, has been justified, historically, not on any basis of sovereignty or public policy, but on the basis that the contractor has *consented* in the contract to the determination of disputes by the person designated in the clause. See *Kihlberg v. United States*, 97 U.S. 398, 24 L.Ed. 1106 (1878), and *United States v. Adams*, 74 U.S. (7 Wall) 463, 19 L.Ed. 249 (1868). The history of the clause also makes it absolutely clear that the only exceptions to the conclusiveness of the decision by the person designated in the clause—*e.g.*, a decision that was fraudulent, arbitrary, or capricious—were first expressed by the courts as an implied condition of the contractor's consent. This implied condition was deemed necessary to justify enforcement of a provision permitting a representative of one of the contracting parties to make the decision, and unquestionably was only for the contractor's protection.

In the clause in this case, the contractor consented to the determination of disputes by the contracting officer, and the *Commission* on appeal. Hence, the "Government's" disavowal of the decision made by its representative named in the contract to make such decision, is a breach of its contractual obligation. We submit that the contractor's consent to permit a specific representative of the Government to decide disputes—the Commission—should not be read as permitting any different representative of the Government to "veto" decisions rendered by the Commission which are in favor of the contractor.

In addition, the "Disputes" clause clearly contemplates that the contractor, not the Government, is to be the moving party at each step in the procedures established by that clause. First, the contractor must present his claim to the contracting officer, and if the contractor's position is vindicated by the contracting officer's decision, that is the end of the matter. There is no Government right of appeal from the decision. However, if the contractor is aggrieved, he has the right to appeal to the head of the department, whose decision, or that of his authorized representative, is "*final and conclusive*," subject only to the possibility that the contractor may seek judicial review of an adverse decision. This possibility is recognized in the clause which confers finality upon the decision of the head of the department, for it specifies the circumstances in which a court may overturn the decision, thus contemplating that it will be only the contractor—the moving party throughout the procedure—who will seek such judicial review.

Accordingly, the "Disputes" clause does not provide for a right on the part of the Government to judicial review, and a refusal by the Government to carry out a decision made on appeal under that clause—which is "*final and conclusive*"—constitutes a breach of that contractual provision. Such breach would then entitle the contractor to recovery without regard to review under the Wunderlich Act standards, inasmuch as that act does not apply to actions for breach of contract. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 16 L.Ed.2d 642 (1966).

As Judge Skelton stated in the portion of his dissent quoted at p. 8 *supra*, this procedure may appear—but at first blush only—to be one-sided and unfair.

More thoughtful study shows that it is not one-sided and unfair. First, the clause is prescribed by the Government and the contractor has to take it if he wants the contract. He has no choice on the matter. Second, the clause and its predecessors have been uniformly interpreted for over 45 years as conferring no right of judicial review on the Government. Third, the clause provides that the mechanics of review are to be invoked at the instigation of the contractor in each instance. Fourth, it is a representative of the Government—a party to the contract—who is the decision maker at each step. And fifth, as discussed below, the contractor is obligated by the contract to proceed in accordance with the decision of the contracting officer.

The decision below has disregarded the breach of contract committed by the Government in this instance, and has thereby set at naught the entire contractual basis established for the resolution of disputes.

4. **The Quid Pro Quo for the Contractor's Disputes Clause Promise To Give Up His Right of Contract Rescission and To Bear the Burden of Financing the Work in Accordance With the Contracting Officer's Decision. Is the Government's Disputes Clause Promise To Provide Speedy, Fair and Final Administrative Settlement Procedures, Subject to the Contractor's Right to Judicial Review:**

When the contracting officer and the contractor are unable to settle a dispute by agreement and the contractor appeals the contracting officer's decision to the agency head, the contractor further agrees, pending a final decision of the dispute, to "proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision." It is obvious that the duty so to proceed may impose a very substantial financial burden on contractors as when,

for example, the controversy centered on whether the work is required by the contract specifications or should be paid for as extra work. It is equally apparent that the public interest in the accomplishment of Government procurement has long required that contractors be asked to relinquish most of their rights to contract rescission by agreeing to proceed with the work, notwithstanding the dispute, and to proceed in accordance with the contracting officer's decision.¹³

The *quid pro quo* to contractors for this relinquishment of the right of contract rescission and for bearing the burden of financing the costs of disputed work pending the administrative appeal has been the Government's promise to provide expeditious and fair procedures for the administrative appeal and final settlement of the dispute and payment thereon.¹⁴ As stated by this Court,

"... Pre-eminently, this policy [of utilization of the administrative procedures contractually bargained for] is grounded on a respect for the parties' rights to contract and to provide for their own remedies. See *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 16 L.Ed. 2d 642, 86 S.Ct. 1545; *United States v. Moorman*, *supra*, 338 U.S. at 461-462, 94 L.Ed. at 259, 260. But, beyond that, there is also a belief that resort to administrative procedures is an expeditious way to

¹³ The standard "Disputes" clause has so provided since 1926. See Petrowitz, *Methods of Resolving Contract Controversies Pertaining to Government Contracts and Subcontracts: An Empirical and Analytical Study*, see Senate Document No. 99, 89th Cong., 2d Sess. (1966) at 17.

¹⁴ We have seen that the purpose of the Wunderlich Act was to enable contractors, notwithstanding the "Disputes" clause language, to obtain judicial review of agency decisions adverse to them.

settle disputes, conducive of speed and economy. *United States v. Blair, supra*, 321 U.S. at 735, 88 L.Ed. at 1043. Such procedures also facilitate a department's supervisory control over contracting officers and perhaps enhance the possibility of harmonious agreement. *Ibid.*" *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429, 16 L.Ed. 2d 662, 667 (1966). (footnote omitted.)

Obviously, if the dispute cannot be settled by agreement with finality at the agency head level and payment made by the Government thereon, the efficacy of the whole system of administrative adjudication and settlement of contract disputes is thrown into doubt, and perhaps into chaos as suggested by Judge Collins in his dissenting opinion below.¹⁵

5. The Request of the Attorney General to the Contracting Agencies To Screen Decisions at the Agency Head Level Favorable to Contractors for Conformity to the Criteria of the Wunderlich Act Coupled With the Decision of the Court Below, Pose Grave Risks to Contractors in Relying on the Finality of Disputes Clause Settlements and Payments Thereon:

On January 16, 1969, the Attorney General, in the course of an opinion to the Secretary of the Air Force, 42 Ops. Att'y Gen. No. 33, as to the effect to be given

¹⁵ See Petition for Certiorari, App. A at A-44. That the Department of Defense views decisions of its Armed Services Board of Contract Appeals favorable to contractors as binding settlements under the "Disputes" clause is shown by the fact that since 1966 its regulations have provided that "Decisions of the Armed Services Board of Contract Appeals constitute decisions of the head of the department as referenced in the disputes clause standard in all Government contracts. It is expected that decisions favorable to the appellant in whole or part will be promptly implemented by payment at the contracting officer level. . . ." ASPR 1-314(g), 32 C.F.R. § 1.314(g) (1970). See Hearings on H.R. 474, *To Establish a Commission on Government Procurement*, 91st Cong., 1st Sess. 1813 (1969).

a decision of the General Accounting Office overruling a decision of the Armed Services Board of Contract Appeals favorable to the Government, stated that:

"The contracting agencies should call to this Department's attention, on a continuing basis, appeals board decisions against the Government which they feel warrant litigation in accordance with the Wunderlich Act." *Id.* at 19.

The Attorney General's opinion continued:

"If an agency has policies or procedures which inhibit its officials from performing this function, it should reconsider them. A contracting agency may also wish to consider whether it should adopt affirmative procedures to facilitate the screening of board decisions." *Id.* at 21.

Finally, the Attorney General stated that:

"Delay in payment to a contractor who has been successful before a board need not be occasioned by the procedures I have suggested. Payment in accordance with board decision might still be made, as it has in the past, subject to recovery by the Government if the decision is later determined by the courts not to satisfy Wunderlich Act standards." *Id.* at 21, 22.

From this it would appear that there will be substantial efforts zealously undertaken within the Government contracting agencies to persuade the Department of Justice (or the General Accounting Office) that disputes clause decisions at the agency head level favorable to contractors should be overturned or challenged on Wunderlich Act grounds. This invitation for subordinates of the agency head so to refer matters to the Department of Justice for appropriate action does not

appear to be deterred by the fact that in the Department of Defense, as was done in Petitioner's case, decisions of the Armed Services Board of Contract Appeals are made "as fully and finally as might each Secretary" make them. 32 C.F.R. § 30.1 (1970).¹⁶ The decision below, if the writ is not granted, will give added impetus to efforts by agency employees to overturn the decisions rendered at the level of their agency heads with which they disagree and to prevent payment on them. This is likely to breed a pernicious informal system, to open the door to disgruntled Government officials and duress and coercion of contractors, and perhaps to invite chaos in the Government contract field. Further, the decision below (viewed in the light of the Attorney General's opinion quoted above) would inject the Department of Justice directly into the administrative resolution of contract disputes where it is not contractually empowered to act. This would be a result which also has no statutory or contractual authorization, and which, by ex parte, anonymous second-guessing of decisions at the agency head level, would contravene the procedural fairness requirements of the "Disputes" clause. Obviously, unless corrected by this Court, all this poses grave risks to contractors (and posed a fatal one to Petitioner) in relying on the finality of "Disputes" clause settlements and payments thereon.

¹⁶ In Petitioner's case the entitlement decisions favorable to Petitioner were made by the Commissioners of the Atomic Energy Commission.

6. The Wunderlich Act and Its History Disclose No Congressional Purpose To Authorize Anyone To Overturn Disputes Clause Decisions at the Agency Head Level Favorable to Contractors:

Prior to the enactment of the Wunderlich Act of 1954, the rare efforts by the Government, at the instance of the General Accounting Office or otherwise, to overturn agency decisions favorable to contractors under the standard disputes clause met with virtually no success in the courts.¹⁷ And so far as the General Accounting Office is concerned, the legislative history of the Wunderlich Act clearly indicates that the Congressional purpose was not to change the jurisdiction of the General Accounting Office any way but to leave it free to exercise its own statutory authority.¹⁸

¹⁷ See the cases cited in Judge Collins' dissenting opinion below, Petition for Certiorari, App. A at A-39, A-40 and at footnote 5 thereto.

¹⁸ H. Rep. No. 1380, 83d Cong., 2d Sess. at 6-7 (1954):

"The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.

"The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office. It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill. At the same time there is no intention of setting up the General Accounting Office as a Court of Claims. . . ."

As stated by the Attorney General in his opinion dated January 16, 1969, 42 Ops. Att'y Gen. No. 33: .

"Precisely what that independent authority [of the General Accounting Office] was or should be was a controversial ques-

Moreover, nothing in the history of the enactment of the Wunderlich legislation discloses any Congressional purpose of authorizing the Government procurement agencies or the Department of Justice to repudiate decisions favorable to contractors at the agency head level on grounds that they might not conform to the criteria laid down by that Act for judicial review available to contractors aggrieved by agency decisions favorable to the Government. Nor does that history show any Congressional awareness of the effect that such a result would have on the financing of Government contracts and on the willingness of contractors to continue to proceed with the contract work and finance it in accordance with the decision of the contracting officer pending the administrative appeal.

On the contrary, as set forth in Reason 1 hereof, the Wunderlich Act, by its very terms, only addressed itself to the situation where the contractor brings judicial review. This, in turn, is the setting of its legislative history.

tion, as to which Congress deliberately avoided making any decision in the Wunderlich Act. While the legislative history contains some conflicting statements, on balance it does indicate that that Congress did not intend to set GAO up as an additional layer of administrative appeal for contractors on disputes questions. The House Report on the bill eventually enacted states that 'there is no intention of setting up the General Accounting Office as a "court of claims." ' ' *Id.* at 12, 13. (Footnotes omitted.)

See also Judge Collins' dissent, *Petition for Certiorari*, App. A at A-39, footnote 3. The relevant statutes pertaining to the General Accounting Office and to the Department of Justice are set forth in Appendix A, *post*.

CONCLUSION

In contractual effect the decision of the Atomic Energy Commission favorable to Petitioner's claims of entitlement under the contract "Disputes" clause amounted to a settlement or agreement that this Court should hold is final and binding on the Government, in the absence of fraud, bad faith or illegality on the part of the Atomic Energy Commission in making that settlement or agreement—none of which is alleged below. So viewed, this controversy has no place in the courts on judicial review under the criteria of the Wunderlich Act.

For all the foregoing reasons, the writ should be granted.

Respectfully submitted,

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Dated: March 29, 1971.

APPENDIX A

1. Section 305 of the Budget and Accounting Act of 1921; 42 Stat. 24, 31 U.S.C. § 71 (1964):

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

2. The same; Section 304 of the Budget and Accounting Act of 1921, 42 Stat. 24, as amended, 31 U.S.C. § 74 (1964):

"Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller General of the United States, may, within a year, obtain a revision of the said account by the Comptroller General of the United States, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government. Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement."

"The General Accounting Office shall preserve all accounts which have been finally adjusted, together with all vouchers, certificates, and related papers, until disposed of as provided by law."

"Disbursing officers, or the head of any executive department, or other establishment not under any of

the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement."

3. Liability of Certifying Officers: Section 3 of the Act of Dec. 29, 1941, 31 U.S.C. § 82d (1964):

"The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification."

4. 28 U.S.C. § 516 (1964): *Conduct of litigation reserved to Department of Justice:*

"Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

5. 28 U.S.C. § 519 (1964): *Supervision of litigation:*

"Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties."

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U.S. DEPT. OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

In the Southern District of the United States

Case No. 1970

N. & S. CONTRACTING, INC., DEFENDANT

United States of America

vs. N. & S. CONTRACTING, INC., a PART OF CONTRACTING TO THE UNITED STATES GOVERNMENT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1398 —

S & E CONTRACTORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF CLAIMS**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A) is reported at 433 F. 2d 1373.

JURISDICTION

The decision of the Court of Claims was entered on November 30, 1970. The petition for a writ of certiorari was filed on February 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in a suit against the United States in the Court of Claims to recover the amount the contracting agency, in a proceeding under the standard dis-

(1)

putes clause of the contract, found to be due to a government contractor, the United States may challenge, to the extent permitted by the Wunderlich Act (41 U.S.C. 321-322), the decision of the agency.

STATUTE INVOLVED

The provisions of the Wunderlich Act, 41 U.S.C. 321-322, are set forth at Pet. App. D1.

STATEMENT

This action was commenced by S & E Contractors against the United States, seeking to recover sums which S & E claimed were owed it under a favorable administrative determination by the Atomic Energy Commission acting pursuant to the standard disputes clause contained in a construction contract to which S & E and the Commission were parties.

The current controversy arose out of disputes between S & E and the Commission during the performance of the contract, which were submitted to the Commission's contracting officer for determination (Pet. App. A-2). S & E challenged the officer's denial of certain of its claims and, pursuant to the disputes clause of the contract, the matter was tried before a Commission hearing examiner in an adversary proceeding, with the contracting officer defending his denial of the claims. When the hearing examiner sustained eight of S & E's claims, the contracting officer sought an appeal to the Commission (*ibid.*). The Commission, which hears appeals on a permissive basis, restricted its review to four limited issues, affirmed the hearing examiner on seven of the eight claims and

ordered the case remanded to the contracting officer for negotiation and settlement (*ibid.*).¹

The resulting settlement discussions were terminated, however, when the General Accounting Office, to whom a technical question on one claim had been directed, formally advised the Commission (46 Comp. Gen. 441) that the Commission's findings on the disputed claims were not supported by substantial evidence and were erroneous on matters of law (Pet. App. A2-A3). When the Commission thereupon advised S & E that it would not take any action inconsistent with the views of the General Accounting Office,² S & E commenced this action in the Court of Claims.

Cross motions for summary judgment were submitted, limited to the issues of the evidentiary substantiality and legal correctness of the Commission's decision sustaining S & E's claims (Pet. App. A3). The United States contended that the administrative determination was erroneous as a matter of law and was not supported by substantial evidence and accordingly, under the Wunderlich Act, 41 U.S.C. 321, was not final. The Commissioner of the Court of Claims did not reach the merits of the dispute, but

¹ These procedures which were contained in 10 C.F.R. 2.1 *et seq.* (1962), are now obsolete. An Atomic Energy Commission Board of Contract Appeals was established in 1964 (10 C.F.R. 3.1 *et seq.*).

² Petitioner contends that the Commission never disavowed the administrative decision allowing S & E's claims. The Commission's decision to acquiesce in the Comptroller General's action was in effect a disavowal of its earlier ruling and precipitated the judicial review proceedings below.

recommended that judgment be entered in favor of S & E on the grounds that the Commission's decision upholding the claims precluded the United States from seeking judicial review based on the Wunderlich Act standards (*ibid.*).

The Court of Claims held that the government was entitled to judicial review of the administrative determination, and remanded the case to the commissioner for consideration of the government's contentions (Pet. App. A14). The court found nothing in the Wunderlich Act or its legislative history to suggest that the government should not enjoy the same right of review of agency decisions as contractors. In response to the argument that no controversy existed because the Commission was in effect attacking its own ruling sustaining S & E's claims, the court stated that the use of an independent hearing examiner sufficiently differentiated the role of the agency as an adjudicator from its role as one of the parties to the controversy (*ibid.*). The court did not pass on the validity of the General Accounting Office's independent review of the Commission's decision, finding that the sole effect of GAO's action was to bring the case before the court for consideration of the Wunderlich Act issues (Pet. App. A4).

Three judges dissented on the ground that there was no controversy once the agency had sustained S & E's claims. One of them stated that "the Wunderlich Act does not, and was never intended by Congress to, invest the federal agencies or their counsel with authority to challenge the decisions which the agencies themselves have made" (Pet. App. A44).

ARGUMENT

The decision below, interpreting the Wunderlich Act, 41 U.S.C. 321, to permit the United States as well as contractors to challenge agency determinations, under the standard disputes clause, of contract disputes on the limited grounds permitted by the Act,³ is correct, supported by the Act's legislative history, and in line with earlier Court of Claims decisions. See *C. J. Langenfelder & Son, Inc. v. United States*, 341 F. 2d 600; *Acme Process Co. v. United States*, 347 F. 2d 538; cf. *United States v. Utah Constr. Co.*, 384 U.S. 394, 422. Petitioner's expressed fear that the prompt settlement of controversies under the disputes clause will be jeopardized by the decision is misplaced. Accordingly, review by this Court is unwarranted.

1. The Wunderlich Act was passed in response to this Court's decision in *United States v. Wunderlich*, 342 U.S. 98, that administrative decisions under the standard disputes clause in government contracts were final and not subject to judicial review. It specifically states that no provision of any contract entered into by the United States "shall be pleaded in any suit * * * as limiting judicial review" of agency decisions in specified instances. 41 U.S.C. 321. Nothing in the Act suggests that this broad provision for review should be limited to decisions adverse to a contractor. Surely if Congress had intended such a result,

³*I.e.*, that the decision of the agency is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." 41 U.S.C. 321.

it would have used explicit language. Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-141.

The legislative history of the Act, reviewed at length by the Court of Claims (Pet. App. A5-A11), confirms the view that Congress intended that judicial review should be available to both parties to a dispute—the government as well as the contractor. During the hearings on the proposed legislation which became the Wunderlich Act, numerous references were made by industry and government spokesmen alike to an expanded right of review which would work “both ways” and be equally available to contractors and the government. Hearings on S. 2487 before Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 2d Sess., pp. 9, 11, 12. The stated position of one of the legislation’s sponsors, the Associated General Contractors of America, was, for example, that (*id.* at 29):

[A]ny decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based.

Thus, the principal argument advanced in favor of a legislative overruling of *United States v. Wunderlich*, 342 U.S. 98, was that both sides should be entitled to relief from arbitrary agency action.

Petitioner’s argument that the government obtained no right of review from the Wunderlich Act is

premised on the fact that Congress did not adopt a proposal providing for review in the General Accounting Office of decisions under the disputes clause.⁴ But it does not follow from the rejection of that proposal that Congress had abandoned the concept that the review which was guaranteed in the courts should be available to both sides of the dispute.⁵

⁴The Court of Claims did not decide, and there is not presented here, any question of the extent of GAO's authority to contest a decision rendered under the disputes clause. As the court below pointed out (Pet. App. A-4), the Executive Branch here determined to contest the AEC decision, and if it has authority to do so, it is immaterial that that contest was touched off by GAO's questioning of the correctness of the decision.

⁵There are explanations for Congress' refusal to provide for GAO review of decisions under the disputes clause which are entirely consistent with the Court of Claims' holding that the Executive Branch can obtain judicial review of such decisions. For example, GAO review could have been considered an unwarranted enlargement of GAO's role with respect to government contracts; or it may have been thought that judicial review—for the benefit of both the government and contractors—was a sufficient remedy for the *Wunderlich* decision, so that GAO review as well would have been duplicative and time-consuming. These objections were repeatedly made during the Senate and House Committee hearings on the proposed legislation. See Hearings on S. 2487 before Subcommittee of the Senate Committee on the Judiciary, 82d Cong. 2d Sess., statement of O. R. McGuire, p. 41; statement of O. P. Easterwood, Jr., p. 120. Hearings on H.R. 1839, S. 24, H.R. 3634 and H.R. 6946 before Subcommittee No. 1 of the House Committee on the Judiciary, 83d Cong., 1st and 2d Sess., statement of California Manufacturers Association, p. 22; statement of National Federation of American Shipping Inc., p. 26; remarks of Congressman Celler, p. 36; statement of Leonard Niederlehner, p. 54; statement of Frederick Hines, p. 93-94; statement of Louis Dahling, p. 97; statement of Charles Maechling, Jr., pp. 105-106.

2. Petitioner argues that the government is bound by the Commission's decision favorable to petitioner in this case, particularly in view of the dual role of the Commission as administrator and litigant.* Yet there is nothing remarkable about the United States as a party with a pecuniary interest challenging an agency determination in court. *E.g., United States v. Interstate Commerce Commission*, 337 U.S. 426; cf. *Far East Conference v. United States*, 342 U.S. 570, 576. Moreover, the argument overlooks the settled rule that the United States can recover public funds wrongfully, erroneously or illegally paid out. *United States v. Wurts*, 303 U.S. 414, *Wisconsin Central Railroad v. United States*, 164 U.S. 190; *United States v. Bank of the Metropolis*, 40 U.S. 377; *J. W. Bateson Co. v. United States*, 308 F. 2d 510 (C.A. 5). A necessary corollary to this rule is that the United States may seek or obtain court review as part of the continuing executive responsibility for administering and enforcing government contracts. See 42 Opin. Atty. Gen. No. 33.

3. Finally, petitioner argues that the decision below will undermine the effect of the disputes clause in government contracts by fomenting litigation, causing

* On this latter point, see *United States v. Utah Construction Co.*, 384 U.S. 394, 422, where this Court stated:

In the present case the [AEC Contract Appeals] Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. * * *

long delays and overburdening the courts (Pet. 11-12). The government's occasional challenge to an agency decision under the disputes clause, however, has far less impact upon the finality of such decisions than does the contractors' invocation of their right to judicial review. In any event, Congress, in passing the Wunderlich Act, decided that judicial review was preferable to absolute finality at the agency level. In substance, petitioner would give renewed effect to the very policy considerations that Congress decided were not paramount.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1971.

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E. ROBERT SEAY, CLERK.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

— 70-88

No. ~~1398~~

S & E CONTRACTORS, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Claims

REPLY BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1398

● S & E CONTRACTORS, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Claims

REPLY BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF THE PETITION

PRELIMINARY STATEMENT

This reply brief is filed by the American Bar Association as *amicus curiae*, pursuant to the written consent of the Petitioner and Respondent which are on file with the Court and pursuant to Rule 24 of the Court.

REASONS FOR GRANTING THE WRIT

In opposing review by this Court, Respondent makes three points.

First, Respondent argues that the Wunderlich Act and its history show no purpose to confine judicial review of contract disputes decisions at the agency head.

level to those adverse to contractors. In particular support of this assertion, Respondent (at p. 6 of its brief) appears to rely on the stated position of one of the sponsors of the Wunderlich legislation, the Associated General Contractors of America, whose witness testified as follows:

“[A]ny decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based.”

However, Respondent omits to mention, as Judge Collins in his dissent below did not, that taken in full context the statement of this witness supports legislation providing for judicial review at the instance of contractors only. As stated by Judge Collins (Pet. App. A-36-37):

“The court fails, however, to quote later testimony of this witness which adds a vital gloss to the quoted testimony:

‘In concluding, we respectfully urge that this committee draft legislation that will grant the United States Court of Claims, and the United States district courts to the extent that they now exercise jurisdiction concurrent with the United States Court of Claims, jurisdiction to hear, determine, and enter judgment against the United States on any claim in which the contractor shall seek a review of a decision on a disputed question between the United States and such contractor, made by an officer, board, or other representative of the United States under any contract entered into with the United States.’ [Emphasis supplied]

"Clearly, looking at his testimony in its entirety, Mr. Hayes was of the opinion that the Government's rights in contract disputes were adequately protected by the 'disputes' clause, which reposes decision-making authority in the Government agencies, and that judicial review was needed only to protect the right of contractors."

Respondent's further challenge to Petitioner's argument that the Government obtained no right of judicial review from the Wunderlich Act because Congress did not adopt a proposal providing for General Accounting Office review of contract disputes decisions is wide of the mark. Here Respondent also fails to take account of the language of the disputes clause according (subject to the Wunderlich Act) contractual finality on the parties to decisions on disputed facts; and this means that no agency of the federal government not empowered by contract or statute to participate in or review the results of the contract disputes process may interfere or otherwise set its results at naught.

Secondly, Respondent argues that Petitioner in urging that the Government is bound by factual decisions favorable to contractors under the contract disputes clause has overlooked the settled rule that the United States may recover public funds wrongfully, erroneously or illegally paid out. Brief for Respondent at 8.

There is no suggestion in the Petition or in our Amicus Curiae Brief in Support of the Petition that actions under the disputes clause necessarily override the power of the Government to recover public funds *illegally* paid. Nor is there any intimation that in proper circumstances responsibility for initiating such recovery may properly fall to the General Accounting

Office as well as to the contracting agency, and, at least in criminal matters, to the Attorney General. What we do question, however, is the blanket assertion of this power by the Attorney General on his own and without regard to the functions committed by statute and by contract to the contracting officer and to the agency head in the resolution and settlement of contract disputes.

Finally, Respondent challenges Petitioner's assertion that the decision below will undermine the effect of the disputes clause in Government contracts "by fomenting litigation, causing long delays and overburdening the courts". Nothing in our experience teaches that Government power, once conferred, is seldom or sparingly exercised.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

— 70-88

No. ~~1888~~

S&E CONTRACTORS, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CLAIMS

BRIEF FOR PETITIONER

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

No. 1398

S&E CONTRACTORS, INC., *Petitioner,*
v.
THE UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CLAIMS

BRIEF FOR PETITIONER

OPINIONS BELOW

The findings and opinion of the Atomic Energy Commission's Hearing Examiner, issued June 26, 1963, (R.), are reported at 2 AEC Rep. 631. The Memorandum and Order of the Atomic Energy Commission, issued November 14, 1963, (R.), granting the Contracting Officer's appeal from the Hearing Examiner's deci-

sion, are reported at 2 AEC Rep. 738 and the decision, on appeal, by the Commissioners of the Atomic Energy Commission, issued May 13, 1964, (R.), is reported at 2 AEC Rep. 850. The opinion of the Comptroller General of the United States is reported at 46 Decs. Comp. Gen. 441 (1966). The report and conclusion of law of the Commissioner of the Court of Claims (App. 18) is unreported. The opinion of the Court of Claims (App. 45) is reported in 193 Ct. Cl. 335, 433 F. 2d 1373 (1970).

JURISDICTION

The opinion and order of the Court of Claims were entered on November 30, 1970. Reconsideration was not requested. The petition for a writ of certiorari was filed on February 26, 1971 (App. 3) and was granted on May 17, 1971 (App. 3; 402 U.S. —, 1971). The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).¹

¹ Although the decision of the Court of Claims is not a final judgment granting or denying relief, that decision does finally determine an important right in issue, namely, the right of the Government, in the absence of fraud or overreaching, to refuse to make payment to a contractor pursuant to an administratively final disputes clause decision and, by such refusal, force the matter into the Court of Claims for reexamination there under Wunderlich Act standards.

The jurisdictional statute (28 U.S.C. 1255) does not contain any requirement of finality, nor does such a limitation appear in this Court's applicable rules, (U.S. Supp. Ct. Rules 19-23). Further, this Court's jurisdiction to review interlocutory orders of the Court of Claims that finally determine the rights of the parties to a contract on issues other than liability has been recognized by the decisions in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966) and *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966).

STATUTORY AND CONTRACT PROVISIONS INVOLVED

1. The Act of May 11, 1954, 68 Stat. 81 (The Wunderlich Act), 41 U.S.C. 321-322) provides:

§ 321. *Limitation on pleading contract-provisions relating to finality; standards of review.*

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. *Contract-provisions making decisions final on questions of law.*

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2a. Section 305 of the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U.S.C. § 71 (1964) provides:

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

2b. Section 304 of the Budget and Accounting Act of 1921, 42 Stat. 24, as amended, 31 U.S.C. § 74 (1964) provides:

Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller General of the United States, may, within a year, obtain a revision of the said account by the Comptroller General of the United States, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government. Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement.

The General Accounting Office shall preserve all accounts which have been finally adjusted, together with all vouchers, certificates, and related papers, until disposed of as provided by law.

Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement.

2c. Section 3 of the Act of December 29, 1941, 55 Stat. 876, 31 U.S.C. § 82d. (1964) provides:

The liability of certifying officers or employees shall be enforced ~~in the same manner and to the~~

same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification.

3a. Section 4(c), 80 Stat. 613, 28 U.S.C. § 516 (Supp. II 1964) provides:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

3b. Section 4(c), 80 Stat. 614, 28 U.S.C. § 519 (Supp. II 1964) provides:

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

4. The Disputes Clause in Petitioner's contract provides:

6. *Disputes*

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30

days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

QUESTIONS PRESENTED

The Court of Claims has construed the Wunderlich Act, 41 U.S.C. § 321-322, as extending to the Government a right, to the same extent as a contractor, to seek judicial review of unfavorable administrative decisions rendered by contracting agencies. The court held that the United States does not commit a breach of contract when payments due a contractor pursuant to a favorable administrative determination on fact claims litigated in accordance with the finality procedures contemplated by the standard Government contract disputes clause, are barred either by the General

Accounting Office, the Department of Justice or the head of the contracting agency, in order to force judicial review of the administrative decisions by compelling the contractor to seek his money in court. The questions presented are:

1. Whether the Court of Claims' construction of the Wunderlich Act is contrary to the meaning and purpose of that Act?

2. Whether, assuming the Wunderlich Act can be construed as extending to the Government a right to seek judicial review of an adverse administrative determination, that right may be asserted by the General Accounting Office or the Department of Justice where neither is a party to the contract, where no question of fraud or overreaching is involved and where the contracting agency itself had directed that payment be made?

3. Whether a final administrative determination entered in a contractor's favor at the conclusion of the adversary proceedings contemplated under the standard Government disputes clause may be repudiated by an agency head after specifically directing that payment be made (the case here) or where controlling procurement regulations of an agency specifically make such determinations final and binding upon the Government?

STATEMENT

1. Background

This case arises out of a competitively-bid construction contract for the building of a section of a nuclear testing facility at the National Reactor Test Station in the State of Idaho that was awarded to Petitioner,

S&E Contractors, Inc., by the United States, acting through the Atomic Energy Commission (hereinafter also referred to as AEC or Commission) on August 4, 1961. The contract was in the amount of \$1,272,000 and its originally specified performance period was 180 days. (App. 4) The contract was executed on U. S. Standard Form 23 (1953 ed.) including the standard general provisions, Form 23A, with the standard adjustment clauses for "changes", "changed conditions", "time extensions, etc." and additional general provisions containing a standard "suspension of work" clause. (App. 4) Further, the contract included a modified standard "disputes" clause, (*supra*, p. 5), which provided for the resolution of "any dispute concerning a question of fact arising under this contract" by the Contracting Officer, subject to a timely appeal to the Atomic Energy Commission whose decision shall be final and conclusive "unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."

The work was completed and the test facility was accepted by the Government on June 29, 1962, 325 days after issuance of the notice to proceed. (App. 5)

During performance of the work Petitioner submitted a number of claims to the Contracting Officer asking for equitable adjustments in contract price and time. These claims were decided by the Contracting Officer on August 8, 1962. The decision was, in general, adverse to Petitioner. Accordingly, pursuant to the contract's disputes procedures, a notice of appeal from the decision was timely filed with the AEC. Certain

additional claims, denied by the Contracting Officer on October 22, 1962, were consolidated with this appeal. (App. 1)

2. Administrative Proceedings

Nine distinct claims, seeking approximately \$1,950,000, were presented to the Commission. These claims were of various types. The "Access" claim, for example, sought an equitable adjustment in contract time and money under the "Suspension of Work" clause based upon a compensable delay in site availability; the "Concrete", "Steam", "Backfill" and "Acceleration" claims sought equitable adjustments in time and money based upon extra work within the scope of the "Changes" clause and the "Weather" claim sought an extension of time based upon excusable delays within the meaning of the "Termination For Default-Damages For Delay-Time Extensions" clause. In addition, there was a claim denominated as "Miscellaneous" (which involved four minor claims for extra work under the "Changes" clause), a "Retainage" claim for money withheld from S&E by the Contracting Officer and a claim of "Impossibility" based upon an inadequate time schedule for completion of performance. (R. Hearing Examiner's Decision; 2 AEC Rep. 631, 637).

In accordance with then existing AEC contract appeal procedures, the appeal was referred to a hearing examiner designated to hear grievances arising under the disputes provision and to render decisions thereon. (App. 1) A full adversary proceeding was had in the matter which took thirteen days to complete. The examiner's understanding of the case was facilitated by a visit to the jobsite, (R. Trial Tr., Vol. 3 at 493), by a specially built model of the testing facility, which

was placed in evidence with appropriate explanatory testimony, (R. Trial Tr. Vol. 1 at 74-86), by extensive documentary support for each of the claims in issue, and by witnesses whose transcribed testimony amounted, in final form, to approximately two thousand, eight hundred pages of trial transcript. On June 26, 1963, five months after the hearing ended, the examiner's decision was issued. Eight of Petitioner's claims were sustained. (App. 6)

Thereafter, by order of the examiner, the matter was remanded to the Contracting Officer for negotiation "without delay" of a final settlement in accordance with the outlines of liability that he had determined. (R. Hearing Examiner's Decision; 2 AEC Rep. 631, 669). However, contrary to this directive, the Contracting Officer sought, and was granted, an opportunity to file out of time a petition for a full Commission review of the hearing examiner's decision. (App. 1; 2 AEC Rep. 679). On November 14, 1963, the Commission issued a memorandum and order granting, in part, the Contracting Officer's request for review and also directing the immediate payment to Petitioner of certain earned sums which the Contracting Officer had retained. (App. 1; 2 AEC Rep. 738, 744).

On May 13, 1964, a final decision was handed down by the full Commission which modified the hearing examiner's decision on one claim, reversed it on another, affirmed the remaining claims, and remanded the matter to the Contracting Officer with instructions to diligently proceed to a final settlement of Petitioner's claims. (R; 2 AEC Rep. 850, 856) With this last action by the Commission, the administrative remedies open to the contracting parties under the contract's disputes clause came to an end.

3. Intervention of the General Accounting Office

Under a letter dated March 6, 1964, a certifying officer of the AEC had sought advice from the General Accounting Office (hereinafter referred to as GAO) as to whether there could be offset from the "retainage" due Petitioner (which the Commission's order of November 14, 1963 had ordered to be paid) certain monies then owing by S&E to its suppliers, the claims for which had been assigned to the Commission. (App. 1, 2). This same letter also requested advice regarding that portion of the retainage which was said to represent damages due the Government resulting from its liability to a follow-on contractor because of a delay in site availability allegedly caused by S&E. (46 Decs. Comp. Gen. 441, 446 (1966)). In connection with this last mentioned request, it should be noted that the merits of the Government's right to withhold any sum on account of contractor-caused site delay had been conclusively settled by the hearing examiner's prior decision (he had found that S&E was not responsible for any delay in performance, R; 2 AEC Rep. 631, 668). Moreover, neither this question nor any of its subsidiary elements was then the subject of the review pending before the Atomic Energy Commission. It was, in other words, a closed question at the time the GAO was asked to render its advice.

The certifying officer's letter of March 6, 1964 had been forwarded to the GAO under cover of a letter by the General Manager, dated March 27, 1964, which stated that the advice of that office (the GAO) was sought under 31 U.S.C. § 82d. (*supra*, p. 4). The letter specifically noted that the forwarding of this request was not to be construed as a request by the Commission for GAO review of, or concurrence in, the deci-

sion reached under the Commission's procedures for decisions on contract disputes. (46 Dees. Comp. Gen. 441, 453. (1966)).

On December 5, 1966, thirty-three months after it had received the certifying officer's request for specific advice on the treatment of an offset from the retainage items, the GAO handed down a two hundred and sixty page opinion letter (now reprinted as Opinion B-153841, 46 Dees. Comp. Gen. 441 (1966)) which treated in detail with each of the various claims, and the evidence in support thereof, that had previously been decided by the hearing examiner and the AEC in favor of Petitioner. The GAO's opinion noted that "... our decision will [not] be limited to the three issues raised by you Your request for decision brings into issue nearly all of the more fundamental questions decided by the Hearing Examiner, but even if it did not, our responsibility under law would not be discharged were we to ignore a questionable claim allowance once brought to our attention." (46 Dees. Comp. Gen. 441, 460 (1966)).

Based upon its *ex parte* review of the evidence, the GAO concluded that "the decision rendered by the Hearing Examiner on June 26, 1953, as reviewed by the Commission, fails to meet the requirements of the Wunderlich Act on material questions of fact and is erroneous on several material questions of law" (46 Dees. Comp. Gen. at 544) The GAO advised the Commission that S&E Contractors, Inc. had no valid claim against the Government, and on March 27, 1967, Petitioner was informed by the Commission that it would take no action in connection with the claims it had previously recognized which was inconsistent with

the views that had been expressed by the General Accounting Office. (App. 10) Jurisdiction to intervene in the contractual disputes process as well as in any other administrative determinations was claimed by the GAO to have been "clearly conferred by the basic settlement and audit authority granted by the Budget and Accounting Act, 1921." (46 Decs. Comp. Gen. at 454)

4. Proceedings in the Court of Claims

Petitioner brought suit in the Court of Claims on April 11, 1967, pursuant to 28 U.S.C. § 1491. (App. 4) On September 29, 1969, the Commissioner of that court submitted a report recommending the allowance of S&E's motion for summary judgment based on the theory that the Commission's failure to have made payment to Petitioner in accordance with the entitlement established by the disputes clause proceedings was a breach of contract. (App. 18) In support of this result, the Commissioner relied on the language of the contract's disputes clause and the statement made by this Court in *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966) that respect should be accorded the parties' rights to contract and to provide for their own remedies. The GAO's actions in the matter were deemed by the Commissioner to have been in excess of its authority.

In subsequent proceedings before the Court of Claims, the Government took the position that the question of the GAO's authority was totally irrelevant to any issue in the case. (R. Defendant's Request For Review of the Commissioner's Recommended Opinion at 4, 5) The only matter for consideration—from the

Government's point of view—was its right to judicial review of administrative adjudication subject to the terms of the Wunderlich Act. And this right to seek such review was said to be a matter which the Department of Justice was free to decide for itself, independent of any prior GAO action, and notwithstanding any contractual commitment on the part of an executive agency to honor the finality of its decisions under the standard Government contract disputes clause. (R. Defendant's Reply To Plaintiff's Response To Defendant's Request for Review of the Commissioner's Recommended Opinion at 6)

An amicus curiae brief was filed by the GAO setting forth that office's views with respect to its jurisdiction to intercede in the contract disputes process. Its position was that the power exercised by it in this case derived from its authority to audit and settle the accounts of executive officers. This it described as an executive function in the performance of which it was acting as a member of the executive branch. (R. Brief of the United States General Accounting Office as Amicus Curiae in the Court of Claims at 28) The point was made, too, that action of the type it had taken in this case was fully anticipated and intended by the Congress when it passed the Wunderlich Act. The GAO agreed, however, with the position taken by the Department of Justice, namely, that the question of the authority exercised by the GAO in this matter was totally irrelevant. (R. Brief of the United States General Accounting Office as Amicus Curiae in the Court of Claims at 3)

On November 30, 1970, the Court of Claims, by a 4-3 decision, upheld the Government's right to seek judicial review, based upon Wunderlich Act standards, of

the contract disputes decision favorable to Petitioner. (App. 45) The court's majority was of the view that it made no difference whether the failure to pay a contractor resulted from a threat of the General Accounting Office to charge a certifying officer's account, (as occurred in this case), or "from a change of heart"² in the contracting agency itself. In either event, the Government was entitled to withhold payment and thereby force judicial review of the final disputes decision. (App. 49)

The dissenting opinion of Judge Skelton, with which Chief Judge Cowen and Judge Collins concurred, (App. 61) stressed the fact that, where as here, there had been no disavowal by the contracting agency of its own final disputes decision, the Department of Justice could not, on its own initiative, seek review of a settled contract matter. And, as to whether a contracting agency could, in fact, seek review of its own administrative decision—have "a change of heart" as the majority put it—Judge Skelton felt that was a point not to be answered until the issue was squarely presented. With respect to the authority exercised by the General Accounting Office in this case, Judge Skelton, as well as Judge Collins in his separate dissenting opinion, (App. 83) disagreed with the majority's acceptance of the role played by the GAO. To all of the dissenters, the GAO's actions reached beyond that office's historically recognized statutory limits.

As a consequence of the Government's delay in payment in this case, the Petitioner has been unable to continue in business.

² This language is the court's own. The opinion below leaves open by whom, in the agency, the "change of heart" may be brought about.

ARGUMENT

SUMMARY AND INTRODUCTION

Disputes clauses are provisions common to all Government contracts. They are, in essence, adjudicatory clauses pursuant to which the Government, as a contracting party, reserves unto itself a power—to be exercised by its own Contracting Officers and the heads of the various procuring agencies (or their designated representatives, the Boards of Contract Appeals)—to unilaterally determine the merits of a dispute between itself and its contractors.

The disputes clause operates in conjunction with other standard Government contract clauses (the so-called equitable adjustment or contingency clauses) which provide for equitable adjustments in contract price and performance time for such factors as Government-ordered changes, changed conditions, work delays and other contract-specified contingencies that may form the basis for a contractor's claim. It is the expeditious resolution of these claims which represents the chief purpose of the disputes process.

To the contractor, this process extends a promise to be paid promptly by the Government either for additional work it may have caused him to finance and perform or for costs arising out of unforeseen problems the contractual responsibility for which has been assumed by the Government. In return for this consideration, the contractor relinquishes his right to stop work or to refuse additional work and, instead, he promises to continue diligently with performance in accordance with a Contracting Officer's directions pending the resolution of a contract dispute. To the Government the disputes process insures uninterrupted

performance of the contract work, (either in accordance with a Contracting Officer's interpretation of that work or his specific changes thereto) and provides the means of quickly settling contract disagreements without expensive and burdensome litigation.

The practice under disputes proceedings long ago effectively established that, except as further pursued by a contractor, decisions rendered by the Government in a contractor's favor were final and conclusive. This is a case where that settled practice was brought to an end.

In a sharply divided opinion, overruling its own Commissioner, the court below held that an administrative disputes decision, rendered in a contractor's favor at the conclusion of the adversary proceedings contemplated under a standard Government disputes clause and accepted as final by the contracting agency itself, could later (a) be barred from payment on the basis of an unsolicited *ex parte* evaluation and challenge to that decision introduced by the General Accounting Office—one not a party to the contract, (b) be relitigated by the Department of Justice on the basis of its own independent examination of the decision without regard to any position earlier taken by the General Accounting Office or the procuring agency itself, and (c) be disavowed by the procuring agency that rendered the decision even though it had committed itself by express contract language and supporting regulation to honor with finality its own disputes decision.

According to the court below, it makes no difference whatsoever what precipitating events may have led or forced a contractor to seek payment on his favorable

administrative decision in the Court of Claims, "When a Wunderlich Act case is pending here", said the court, "the only question is how much finality attaches to the findings and holdings of the Board set up to execute the powers of the head of the agency in the premises." (App. 49) In short, the Government's failure to implement, by payment, a final disputes decision in a contractor's favor was held not to constitute a breach of contract—at least not until the court itself has independently reexamined the bases of the administrative decisions in light of the review criteria set forth in the Wunderlich Act, (*Supra*, p. 3) by having the contractor prove his case again.

No decision of any court has ever more seriously imperiled the viability of the disputes process or placed upon federal contractors greater uncertainties and hazards in the conduct of their business than the decision below. Judge Collins' trenchant remark put the situation well: "After today's decision the Government would be foolish to pay *any* board awards." (Dissenting Op., Collins, J., App. 95) We are convinced that the court's decision, if it is allowed to stand, will impose a needless and unwarranted burden upon administrative and judicial machinery, will encourage protracted litigation at the expense of successful contractors, and, because the court's decision robs the disputes process of its reasons for being, it will ultimately bring that mechanism to an end. We are equally convinced that the court's decision was wrong. In brief, our reasons are:

First: Contrary to the Court of Claims' conclusion, the framers of the Wunderlich Act never contemplated that the Government should be granted a power—to be exercised either through the GAO or through any other

Governmental arm—to avail itself of the finality standards of that Act in order to obtain a “substantial evidence” review of a final administrative decision rendered in a contractor’s favor by a procuring agency itself. Clearly, the text of the Wunderlich Act does not sanction such a result and its legislative history most affirmatively rejects such a conclusion. The Wunderlich Act was intended for one purpose only: To restore to aggrieved contractors their right to secure judicial review of an adverse disputes clause determination on grounds more expansive than fraud. The Act was a command to the Government not to plead the disputes clause as limiting judicial review only to cases where fraud was involved.

Second: Regardless of what conclusion one might draw in regard to the meaning and purpose of the Wunderlich Act, the fact remains that that Act was in no sense a jurisdictional statute. It added no powers either to the GAO or the Department of Justice. Nor does that Act prohibit contracting agencies from writing “fact” disputes clauses. The Act was intended to, and does no more than, prescribe a rule of law with respect to the degree of finality that should attach to administrative determinations made on a contractor’s claim in the course of the standard disputes procedures contemplated under Government contracts. There is nothing in that Act that could even remotely be construed as sanctioning a departure from the principle which this Court has always adhered to, namely, that the integrity of an agreement drawn between parties competent to contract, and decisions made under them, cannot be undermined by those who are not parties to such an agreement. Yet it is the violation of precisely this principle which the Court of Claims con-

done by tolerating the GAO's usurpation of the contracting agency's decision-making function and by permitting the Department of Justice to relitigate the contractor's claims on the basis of that department's own independent views of the matter notwithstanding the contrary views of the procuring agency itself.

Third: Neither on facts of this case nor under the presently controlling procurement regulations is there any basis to support the court's statement that, where a contracting agency has committed itself to honor with finality a determination it has made in favor of a contractor, it may thereafter disavow its own decision through the simple expedient of what the court called "a change of heart in the agency itself." (App. 49).

The AEC never repudiated its own decision in this case. In fact, it was the full Commission itself that rendered the decision that is in question now. But these particular facts aside, the point is that it makes no difference whatsoever whether the administrative decision in the contractor's favor emanates from the agency head or from an authorized representative thereof. What matters, in either event, is that by contract language and by supporting regulations, the decision so rendered is final and binding upon the Government. In short, having fully committed itself to finality, the agency can have no change of heart.

THE TEXT AND LEGISLATIVE HISTORY OF THE WUNDERLICH ACT REJECT THE CONCLUSION OF THE COURT OF CLAIMS THAT CONGRESS INTENDED THAT ACT TO BE USED AS A BASIS FOR INVITING COLLATERAL ATTACK UPON FINAL ADMINISTRATIVE DECISIONS FAVORABLE TO A CONTRACTOR

At the heart of the controversy in this case is the meaning and purpose of the Act of May 11, 1954, 68 Stat. 81 (The Wunderlich Act) 41 U.S.C. 321-322, which provides:

§ 321. *Limitation on pleading contract-provisions relating to finality; standards of review.*

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent (sic) or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. *Contract-provisions making decisions final on questions of law.*

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

In the decision below, this Act was held to confer upon the Government, as a contracting party, the right to obtain judicial review of an administrative disputes

decision coextensive with that traditionally allowed to the contractor under the terms of that law. The holding was based on two grounds. First, the court's reading of the statute: "Strictly read the Act favors neither Government nor contractor: judicial review . . . seems extended equally and under like conditions to both contracting parties." (App. 50) Second, its reading of the legislative history: That history "albeit not explicitly, in general supports this construction [of co-extensive rights of review]". (App. 50) We cannot agree with either conclusion.

Though the Act is hardly a model of clarity, even a "strict" construction of that statute could not lead one to ignore the strained interpretation that results when that Act is read as granting to *each* of two contracting parties the right to seek judicial review on a decision rendered by one of them on a dispute arising under the contract.

Such a result was never intended. The Wunderlich Act was meant to and does address itself to one situation only, i.e., appeals by contractors from adverse disputes decisions, and this is evident when the Act is viewed in its setting.

In this connection we would point out, as a preliminary matter, that, while the Court of Claims purported to look to the relevant legislative history to reinforce its conclusion, its approach to that history was deficient in one vital aspect. The court failed to give any consideration (at least its opinion reflects none) to the most pervasive theme in that legislative history—the struggle to achieve an accommodation between two competing interests: the Comptroller General's need to have some voice in contract matters and the need of con-

tractors and procuring agencies to be able to render disputes determinations free from any further Governmental second-guessing.

The Court of Claims' review of the legislative history led it to the conviction "that Congress through the Hearings received a presentation emphasizing more the need for courts of competent jurisdiction to be open to both parties". (App. 53) But this is quite beside the point. Indeed, it is a conclusion disputed by no one. The real question, in fact the only question, is how and to what extent, this needed access to the courts was meant to be distributed and balanced between the competing interests that were represented in the Wunderlich hearings.

We are convinced that when full consideration is given to the basic purposes of the Act, the various legislative drafts that were submitted, the near universal opposition to permitting the GAO a voice in disputes proceedings, the clear and affirmative heed to that opposition manifested by Congress through responsive changes in the proposed legislation, the strong disclaimers by GAO and Congress of any intent to expand that office's authority, the retention of the words "judicial review" in the final legislation and perhaps most important of all, the contractor's compelling need for finality in disputes matters—then, upon the weighing of all these factors, the decision below cannot be allowed to stand.

A. THE WUNDERLICH ACT: BACKGROUND AND LEGISLATIVE HISTORY

In *United States v. Moorman*, 338 U.S. 457 (1950) this Court upheld the validity of an "all" dispute clause, i.e., a clause which authorized a Contracting

Officer to make decisions both on questions of fact as well as law. One year later, in *United States v. Wunderlich*, 342 U.S. 98 (1951), it was held that decisions of Government officers on contractor claims rendered under the authorization of a Government "facts" disputes clause were final and binding absent fraud on the part of such officers. The direct effect of these two decisions—which, in combination, granted nearly absolute finality to all administrative disputes determinations—was to bring to an end the practice that had developed in the Court of Claims of granting contractors the benefit of a judicial review of adverse administrative determinations under such various criteria as arbitrariness, bad faith and lack of substantial supporting evidence. See, e.g., *Needles v. United States*, 101 Ct. Cl. 535, 604 (1944) and *Bein v. United States*, 101 Ct. Cl. 144, 167 (1943).

1. Activity in the 82d Congress: Proposed Legislation Modified To Include GAO

In its opinion in *United States v. Wunderlich*, *supra*, this Court suggested that, "If the standard of fraud that we adhere to is too limited, that is a matter for Congress." (342 U.S. at 100) Indeed, reaction to the *Wunderlich* decision was immediate and remedial legislation—urged by federal contractors as well as by Government officials—was introduced in both Houses during the 82d Congress to overcome the effect of the decision and to restore to contractors their access to the courts. These bills, H.R. 6214, H.R. 6301, H.R. 6338, H.R. 6404, S. 2432, and S. 2487, though variously worded, had two common elements: While all spoke in terms of *judicial* review of administrative decisions none mentioned a right of review in behalf of the Government.

The General Accounting Office raised immediate objection to this legislative "omission". In the Senate hearings held on S. 2487, the Assistant Comptroller General said:³

S. 2487, as introduced, is considered by the General Accounting Office as inadequate and is objectionable because no provision is made therein for a review of decisions of administrative officers by the Government, through the General Accounting Office. Without a provision to that effect, the General Accounting Office in performing its statutory functions (sic) placed upon it would be precluded from questioning the propriety or legality of payments made to a contractor as the result of an arbitrary or grossly erroneous decision on the part of the contracting officer.

Furthermore, it is the view of the General Accounting Office that the bill should contain language prohibiting the executive contracting agencies from including a clause in a contract purporting to make the decision of the administrative officers final and conclusive on questions of law.

In lieu of the pending bill S. 2487, it is urgently recommended that there be enacted a bill providing substantially as follows:

No Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative or board. Any stipulation in a Government contract to the effect that disputed questions shall be finally determined by an administrative official, representative or board shall not be treated as binding if the General Accounting Office or a court finds that the action of such officer, repre-

³ *Hearings Before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 2d Sess. 10 (1952).*

sentative, or board is fraudulent, arbitrary, capricious, grossly erroneous, or that it is not supported by substantial evidence.

The views expressed by the Assistant Comptroller General were, in general, endorsed by O. R. McGuire, a former counsel to the Comptroller General.⁴ However, in the testimony of this important witness, there is foreshadowed the outlines of the present dispute, namely, the GAO's authority and understood practice as it related to questions of fact and law underlying contract payments. The witness said:

The imposition of a second or third administrative review by another Government agency, such as the General Accounting Office, on the facts would only worsen present conditions.

Though I do believe that the Comptroller General should continue to have the authority which he has exercised before the Wunderlich case of reviewing the contract payments under the law.

When asked whether he had studied the draft proposal earlier submitted by the Assistant Comptroller General (quoted above), the former GAO counsel answered:

No, I have not studied that particular draft, but I have been familiar with the arguments for many years. In fact, I have made some of the arguments up here on behalf of the General Accounting Office to the Congress. And I believe that the review should be limited of the General Accounting Office on these particular kinds of questions, to questions of law, because the General Accounting Office has even less organization than the head of the Department to make de novo an investigation of the facts.

⁴ *Id.* at 41.

He must, and does, rely upon the facts and for the doing by the administrative officers concerned, whose actions are unquestioned and unchallenged by the contractor.

But I think the Comptroller General can take care of any situation from an audit standpoint, or from the standpoint of settling claims for that matter, if he will accept the facts, unless, of course, there is fraud, or just gross mistake that is reported to him by the administrative officer.

There is no need to duplicate that.

And, on the same point, he added:

But I do not believe he should review the facts and I do not believe that he claims that his office should review the facts.

In response to the urgings of the Comptroller General's office, S. 2487 was amended so as to preclude finality from attaching to any disputes decision "which the General Accounting Office or a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative and substantial evidence." (For the full text of this bill, see 98 Cong. Rec. 9059, July 3, 1952) The Senate passed the amended bill S. 2487 but the House did not act upon it during that session of Congress.

2. Activity in the 83d Congress: Opposition To Including GAO in Bill; Compromise Adopted

In the 83d Congress, new legislation was introduced. Two of these bills, S. 24 and H.R. 1839, contained language identical to that which had appeared in the amended bill, S. 2487. These new bills, in other words, expressly recognized a right on the part of the Govern-

ment (acting through the General Accounting Office) to invalidate disputes decisions on precisely the same review grounds that a contractor would be entitled to invoke in his own behalf before the courts.

In the House hearings that followed,⁵ the opposition to the sanctioning of such authority in the General Accounting Office was virtually unanimous. Government and industry alike spoke against the proposal. Their objections went to one point: Inclusion of the Comptroller General in the wording of the legislation was not only unnecessary but also totally at odds with the purposes of the disputes process. It would create uncertainty and delay, impair contractors' bonding and banking capabilities, encourage protracted litigation and destroy the finality which existed under the disputes procedures. A sampling of the witnesses' comments follows:

In agreeing to the usual disputes clause a contractor with the Department of Defense has permitted the other party to the contract to be the arbiter of all disputed questions of fact. The Government has recognized its responsibilities in this regard, and the Armed Services Board of Contract Appeals is an excellent and impartial body of a judicial character. But, having surrendered such rights of decision, it is hardly fair or just to ask a contractor also to submit to second guessing by a second and unrelated Government agency such as the General Accounting Office. The placing of any other governmental administrative agency in such a position would have equally unfortunate results. Such double administrative review is wholly unnecessary and wholly unfair to the contractor. This point alone justifies completely our position

⁵ *Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary*, 83d Cong., 1st & 2d Sess. (1953, 1954).

that this bill should not be enacted in its present form. (Statement of Frederick E. Hines, On Behalf of Aircraft Industries Association of America, *House Hearings* at 93)

The bill, H.R. 1839, [identical in wording to S. 24] adds an additional factor which would complicate the efforts of the Department of Defense and other executive agencies in obtaining the maximum degree of finality under its contracts. That is the provision which would apparently permit the General Accounting Office to render the disputes clause in any contract void, by making a finding to the effect that an administrative decision was "fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence." The General Accounting Office has, of course, general authority to review fiscal transactions of Government agencies, including contractual obligations and disbursements thereunder. However, in cases in which the contract contains a disputes clause and that clause has been utilized to secure a final administrative determination of fact, no further review by other agencies is required.

* * *

To superimpose General Accounting Office review on existing disputes clause procedures would not only create a completely new review, it would, as a practical matter, eliminate the usefulness of the disputes clauses themselves by destroying the concept of finality and dividing the responsibility for determining the merits of any given appeal. Undoubtedly, this would generate protracted and expensive disagreements among Government agencies, the General Accounting Office and contractors representatives. This would defeat the aims of both the Government and its contractors by making it impossible to accomplish the very purposes of the disputes clause; i.e., the achievement of proper and expeditious performance of contracts. (Letter of Roger Kent, General Counsel, Department of

Defense, to Chairman of the House Committee on the Judiciary, *House Hearings* at 132)

Third, on the question of the General Accounting Office, it is my understanding that the General Accounting Office considers that it should have the same authority which it had pursuant to law before the decision in the Moorman and Wunderlich cases.

Accordingly, it is unnecessary specifically to mention the General Accounting Office in the proposed legislation, to accomplish this. Further, specifically to mention that Office might imply a new type of review of the finality of administrative decisions which conceivably could cause difficulty for contractors, particularly as far as the bankability of their contracts are concerned. (Statement of Leonard Niederlehner, Deputy General Counsel, Department of Defense, *House Hearings* at 54)

The alleged purpose of the bill originally was to counteract the effect of the Wunderlich case which reversed the Court of Claims and in effect held that the disputes clause precluded judicial review. S. 24, however, is cloudy as to intent and recognizes the jurisdiction of the General Accounting Office which has not previously been concerned with the disputes clause and which would only add confusion to an already complicated matter. (Statement of California Manufacturers Association, *House Hearings* at 22)

... the Federation urges that the bill be amended so as to delete the provision permitting review by the General Accounting Office of decisions of administrative officials. The effect of the provision is to set up the General Accounting Office as a "court of claims." It is unnecessary to point out that an agency of the legislative branch of the Government should not be used to perform functions intended for the judicial branch. (Statement

of National Federation of American Shipping, Inc., *House Hearings* at 26)

Like some of those who have spoken before me, I am disturbed by the mention of the General Accounting Office in the Senate bill. It is also mentioned in H.R. 1839. I think it has no place here. I get reassurance from the Senate report, which states that this language is not intended to add or subtract from the present jurisdiction of the GAO in any way. As you know, the precise extent and limits of the Comptroller General's jurisdiction is presently a matter of great concern and open dispute. I do not think that that involved question should be injected here. It would only lead to confusion and would divert attention from the prime purposes of this remedial legislation to afford legislative relief from the unfortunate effects of the Wunderlich decision. (Statement of Robert E. Kline, Jr., Representing the National Association of River and Harbor Contractors, *House Hearings* at 103)

The language of S. 24 apparently establishes the General Accounting Office as an additional administrative agency for the review of disputes under Government contracts. This innovation would have a serious impact on existing procedures for arbitrating such disputes and giving the requisite degree of finality to decisions thereunder. Over the years the contracting agencies of the Government with which the electronics industry does almost all of its business, namely, the Department of Defense, the Atomic Energy Commission, and the GSA, have developed efficient and workable systems for arbitrating disputes and reaching decisions on questions of fact. Procedures have been devised for insuring that contractors are given a fair and impartial review of adverse decisions by contracting officers. Boards of contract appeal have been established, such as the Armed Services Board of Contract Appeals and the boards of some

of the civilian agencies. Clear and effective procedures have been devised for appealing decisions of these boards under certain conditions to the courts. Under S. 24, however, the scope and powers of the General Accounting Office are vastly enlarged, and this agency of the Government, which has heretofore exercised principally investigatory and audit functions, becomes clothed with powers of a judicial nature. S. 24 appears to set up the General Accounting Office as a third administrative tier of review in Government contract disputes.

* * *

One thing especially seems clear, and that is that the finality now afforded the decisions by Government boards of contract appeals, and in particular the Armed Services Board of Contract Appeals, would be utterly nullified by the establishment of a new administrative agency of review, and the usefulness of these boards would come to a quick end. The Department of Defense in its testimony has corroborated our prediction in this regard. (Statement of Charles Maecling, Jr., Representing the Radio-Electronics-Television Manufacturers Association, *House Hearings* at 105, 106).

Turning now to the McCarran bill, [meaning the amended S. 2487 which contained wording identical to the later S. 24] my first reaction is that, while it purports to favor the private contractor, it operates like a boomerang in that it undermines the security and bankable quality of Government contracts by permitting the General Accounting Office for the first time in history to reverse a contracting officer's decision favorable to the contractor within the 3-year statute of limitations on grounds other than fraud or gross mistake implying bad faith.

Obviously, the Comptroller General, as watchdog of the Treasury, has a legitimate concern about the recent application of the Wunderlich fraud test

against the Government. (See *Leeds & Northrup Co. v. U. S.*, 101 F.Supp. 999 (E.D. Pa. 1951).) The General Accounting Office clause in the McCarran bill, however, would do much more than restore the pre-Wunderlich rule; it would set up the General Accounting Office as a second Court of Claims with power to reverse a favorable contracting officer's decision if it decided that there were no substantial evidence to support it. Private contractors, surety companies writing performance and payment bonds, and banks financing long-term contracts have reason to be afraid of the repercussions of this provision. (Statement of Franklin M. Schultz, Attorney at Law, Washington, D. C., *House Hearings* at 116)

The universal opposition to the GAO's inclusion in the proposed legislation (i.e., S. 24), and the impasse between that office and the Department of Defense, see, 99 Cong. Rec. 4598 (1953) (remarks of Senator McCarran), caused the Comptroller General to offer a substitute measure—one which deleted all reference to his office. (Letter dated December 30, 1953, from the Comptroller General to the Chairman, House Committee on the Judiciary, *House Hearings*, at 34, 135-137). Except for the words "in any suit now filed or to be filed" this "substitute" bill—which was patterned closely after S. 2487, the bill first introduced by Senator McCarran during the 82d Congress—constitutes the present language of the Wunderlich Act.

In submitting the substitute bill for consideration and in recommending its passage, the Comptroller General said: "In my judgment this substitute language will accomplish what we have been striving for all along and will place the General Accounting Office in precisely the same situation it was in before the

decisions in the Wunderlich and Moorman cases." (House Hearings, at 136)

And industry, in also endorsing this substitute bill, said:

It is still possible that the substitute bill might be interpreted, contrary to the statement in the prior committee reports, to enlarge the jurisdiction of the General Accounting Office with respect to decisions by heads of departments or appellate boards. But since the substitute bill, unlike H.R. 1839, H.R. 6946, and H.R. 3634, does not apply to initial decisions by contracting officers, it can have no effect upon the status of the General Accounting Office. I might point out that this substitute provision does follow in this respect the language and scope of the amended disputes clause of the Department of Defense referred to in prior testimony on behalf of the Department. (Statement of Frederick E. Hines, On Behalf Of Aircraft Industries Association of America, House Hearings at 93)

In our view, the adoption of this language will rectify the unfortunate situation created by the Wunderlich decision, without disrupting finality of settlement and without disrupting the present appellate procedures provided by the Government boards of contract appeals. (Statement of Charles Maechling, Jr., Representing the Radio-Electronics-Television Manufacturers Association, House Hearings at 106)

... the American Merchant Marine Institute finds no objection either to the substitute bill suggested by the Comptroller General of the United States in his letter to the chairman of this committee dated December 30, 1953, and as to which Mr. Lyle Fisher testified yesterday. That substitute, which I understand to be the product of joint

industry-Government consultation, does not vest the General Accounting Office with authority to set aside administrative decisions of questions of fact arising under a Government contract. (Statement of Francis T. Greene, Executive Vice President, American Merchant Marine Institute, Inc., *House Hearings* at 122)

Insofar as the Department of Defense was concerned, it too joined in supporting the substitute bill. That Department's opposition to the predecessor bill, S. 24, had been based on two main points: First, S. 24 was seen by the Department of Defense as expanding the role of the GAO from a then restricted right of review limited to questions of law only, to a right of review that would encompass both questions of law and fact. Second, this expanded right of GAO review was regarded by the Department of Defense as imposing hardship—both upon the Government as well as private industry—in that years would elapse before an administrative decision on a contract matter could reach finality. It was with a view to overcoming these objections that the Department of Defense had, at one point, drafted an amendment to S. 24 which stated that decisions on "disputes involving questions of fact . . . shall be binding except as [they] may be determined by a court of competent jurisdiction to have been arbitrary, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." (For the full text of the amendment and the views of the Department of Defense objecting to S. 24, see 99 Cong. Rec. 4598 (May 6, 1953)):

That these objections were removed by the substitute bill is evident from the Comptroller General's

letter of December 30, 1953 advising that: "... representatives of interested administrative agencies have indicated to us that ... there would be little or no opposition to the particular language of the substitute draft." *House Hearings* at 136.

On this state of the legislative record, it seems incredible that the General Accounting Office could have concluded, as it did in this case, that "... Congress, when it was considering the Wunderlich Act, expressly recognized the jurisdiction of the General Accounting Office to review Disputes clause decisions on questions of fact and law" 46 Dees. Comp. Gen. 441, 455 (1966) Nonetheless, it was on the basis of that conclusion that the GAO here undertook an *ex parte* review of the administrative disputes decision earlier made in Petitioner's favor and rewrote that determination to accord with its own view of the controverted facts and the law it deemed applicable thereto.

When suit was brought in the Court of Claims, the Department of Justice sidestepped the issue posed by the GAO's intervention in the disputes process by saying that that question "is totally irrelevant to any issue in the present case" (R. Defendant's Request For Review of the Commissioner's Recommended Opinion at 4) and the Court of Claims met the point by stating that "... the Comptroller's powers of decision and settlement, though great, may be assumed to lapse and fail at the Court House door." (App. 48)

Quite obviously the Comptroller General's intervention in this case was not an irrelevant factor nor, as a practical matter, could it be said that his powers of

decision and settlement lapsed at the Court House door. It was the actions of the Comptroller General that precipitated this suit in the first instance and only by treating those actions (and the indirect support later given them by the Department of Justice) as being within the contemplation of the Wunderlich Act, could the Court of Claims have concluded, as it did, that the failure to pay Petitioner was not a breach of contract.

B. THE ISSUE POSED BY THE LEGISLATIVE HISTORY

The problem of statutory interpretation raised in this case turns on one point only: the meaning and effect to be given to the Comptroller General's statement—included in the committee report that accompanied the final bill—that the substitute language (i.e., the later Wunderlich Act) would place the General Accounting Office "in precisely the same situation it was in before the decision in the Wunderlich and Moorman cases." (*House Hearings* at 136; H.R. Rep. No. 1380, 83d Cong., 2d Sess. 6 (1954)).

Today the Comptroller General claims that by this statement it was intended (and understood) that there should be "restored" to the General Accounting Office its right under the Budget and Accounting Act of 1921, 42 Stat. 24, as amended, 31 U.S.C. § 74 (1964), (*supra*, p. 4), to review disputes decisions in the same manner as the courts, save only that that office could not conclusively determine the rights of the parties to the contract. 46 Decs. Comp. Gen. 441, 454 (1966)

This contention cannot stand. It proceeds upon an erroneous view of the law existing prior to the decisions

in *Moorman* and *Wunderlich* and, further, it seriously distorts the *Wunderlich* Act and its legislative history.

The decisional law prevailing in the lower courts prior to the *Moorman* and *Wunderlich* decisions stood uniform on the point that, in the absence of fraud or overreaching, the Comptroller General was without authority to contest facts administratively resolved where the contract itself vested the final power of determination in the executive agency. The cases that have so held are numerous. See, e.g., *Consolidated Vultee Aircraft Corp. v. United States*, 97 F.Supp. 948 (D. Del. 1951); *John H. Mathis v. United States*, 79 F. Supp. 703, 708 (D. N.J. 1948); *McShain Co., Inc. v. United States*, 83 Ct.Cl. 405, 409-10 (1936); *Albina Marine Iron Works, Inc. v. United States*, 79 Ct.Cl. 714, 719-20 (1934); *Penn Bridge Co. v. United States*, 59 Ct.Cl. 892, 896-98 (1924). One could not possibly conclude from these representative cases that the GAO ever had a statutory right to intervene in the disputes process. At most, the cases support only the fact that the Comptroller General often made *attempts* to usurp the executive agency's prerogative to decide contract disputes, but such could hardly lend support to a claim that the power he sought to assert was ever lawfully vested in his office in the first place.

Nor has this Court ever declared a contrary rule concerning the Comptroller General's authority. Whether finality of an executive determination on a claim against the United States was based upon explicit contract language, as was the situation in *United States v. Mason & Hanger Co.*, 260 U.S. 323 (1922) or whether such finality derived from a law that vested fact-finding authority in a particular executive agency,

as was the case in *Wright v. Ynchausti & Co.*, 272 U.S. 640 (1922),⁶ the result, in either event, as these cases plainly show, was to put the agency's factual determination on the merits beyond the reach of the Comptroller's office. The same point has been made by the Attorney General. See 37 Ops. Att'y Gen. 95 (1933); 34 Ops. Att'y Gen. 162 (1924).

We know of no decision arising prior to the *Moorman* and *Wunderlich* cases that ever recognized a right in the GAO to reexamine the merits of a contract claim whose factual aspects had previously been administratively resolved. Nor does the Comptroller General's opinion cite any such case. It relies instead upon the

⁶ *Wright v. Ynchausti & Co.*, 272 U.S. 640 (1922) involved a controversy between Wright, the Insular Auditor of the Philippine Islands (whose functions were substantially the same as those performed by the Comptroller General in the United States) and Ynchausti & Co., steamship operators, concerning payment of a customs duty in accordance with a refund determination earlier made in the company's favor by the Collector of Customs. The Insular Auditor refused to countersign the payment warrant, contending that he had a right to determine the merits of the refund question. This Court held that the Auditor had no power to review the findings of the Collector and to form his own judgment on the matter when determination of the questions involved was within the exclusive province of another agency. It said:

"... where the Insular Auditor is not vested with administrative discretion to pass upon the merits of the claim for which the warrant is drawn, his only function is to determine whether the warrant is drawn by the proper officer upon the decision of the proper tribunal, and is applicable to an existing appropriation, and having been satisfied as to these preliminaries, his duty is merely ministerial

We may add that such a conclusion is quite in keeping with the functions of the auditors of the treasury and the Comptroller of the Treasury of the United States, a comparison which is constantly used in the Philippine statutes." (272 U.S. 651, 652)

more general proposition—declared in *Charles v. United States*, 19 Ct.Cl. 316, 319 (1884) and *Longwill v. United States*, 17 Ct.Cl. 288, 291 (1881) that claims of a doubtful nature may be rejected by the Comptroller's Office, thereby leaving the claimants free to seek a remedy in court. 46 Decs. Comp. Gen. at 459 (1966).

That this is true as a general proposition we do not question. The point is, however, that it has no application in cases such as this one, where the subject matter of the claim falls outside of the Comptroller's discretionary authority and rests, instead, within the competence of another department. Much more in point is what this Court said in *United States v. Jones*, 59 U.S. (18 How.) 92, 95 (1856), on the question whether the accounting officers could contest the legality of a disbursement that had been made by the Secretary of the Navy.

The Secretary of the Navy represents the President, and exercises his power on the subjects confided to his Department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the Constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments.

Thus, when the Comptroller General based his endorsement of the bill which later became the Wunderlich Act on the ground that it would restore his office to the position it earlier held, we cannot comprehend

how this endorsement could now be extended to embrace more than cases of fraud or overreaching.

But if more than this was intended then it was certainly not so understood by those representatives of Government and industry who joined in endorsing the substitute bill. The Comptroller General's present position on the meaning of the Wunderlich legislation undercuts the very reason for the enactment of a compromise bill. There would simply have been no point in objecting to the GAO's being named in the proposed legislation in the first place if it were thought that that office would be allowed to impede the finality of a disputes decision whether or not the GAO were named in the legislation itself. The Comptroller General's position reduces the compromise underlying the legislation to a mere agreement on form, devoid of substantive connotations, and that most assuredly was not what the opposition to the GAO was all about, nor what was intended by the passage of the Act in its final form.

To overcome this sticking point, the GAO has sought to cast the opposition expressed against it during the Wunderlich hearings as an opposition based on the fear that expressly naming that office in the bill would make the GAO another Court of Claims with judicial power to render decisions binding on both parties to the dispute. (R. Brief of the United States General Accounting Office as Amicus Curiae in the Court of Claims at 41, 46)

This indeed was one of the points raised in opposition to the GAO being named in the bill (See Statement of Charles Maechling, Jr., Representing the Radio-Electronics-Television Manufacturers Associa-

tion, *House Hearings* at 105; *supra*, p. 31) but only the least of many. Opponents of the bill, such as counsel for the Department of Defense, entertained no doubt about the real significance of naming the GAO in the proposed law. As noted previously (*supra*, pp. 29, 30) they opposed any bill specifically mentioning the GAO for the very reasons this case itself makes abundantly clear—finality of disputes decisions would be destroyed.

There can be no doubt about what the Department of Defense meant about superimposing the General Accounting Office on existing disputes procedures. Senator McCarran quite correctly stated the view of that department on the floor of the Senate: "This bill [S. 24, the pre-compromise bill which expressly named the GAO] has been held up, I am informed, at the request of the Air Force. The Air Force, I am further advised, objected to the fact that the bill gave the Comptroller General the same right that was given to a contractor to question a decision of a contracting officer" 99 Cong. Rec. 4598, (May 6, 1953).

The Department of Defense had made known its opposition to the bill in unmistakable terms and it was known also to Senator McCarran that passage of the objectionable bill would lead the Air Force to seek its veto. 99 Cong. Rec. 4598. Bearing in mind that the Department of Defense was then one of the few procuring agencies operating under a well-defined disputes board procedure, the Comptroller General could have been under no illusions regarding the scope and intent of Defense Department objections and his office is plainly wrong when it claims, as it does today, that opponents to naming the GAO in the bill were concerned simply with avoiding a grant of binding au-

thority to that office. The plain fact is that the Department of Defense did not want a bill that gave the GAO any authority over disputes procedures and that Department most certainly did not intend to endorse a bill that could later be construed as giving to the GAO the very authority which the Defense Department—and industry as well—saw so objectionable in the first instance.

True enough, the GAO can point to the fact that representatives of that office had testified during the hearings that enactment of either S. 24 (the version of that bill which specifically named the GAO) or the substitute bill (the compromise bill which deleted reference to the GAO) would allow that office its sought-after role in the disputes process (Statement and testimony of E. L. Fisher, General Counsel, General Accounting Office, *House Hearings* at 38, 39). The point seems persuasive—but only if one is willing to ignore the contrary statement, likewise made by representatives of the GAO during the hearings—that enactment of legislation that failed to mention that office would preclude the GAO from questioning decisions rendered pursuant to the disputes provision. (Statement of Frank L. Yates, Assistant Comptroller General of the United States, accompanied by E. L. Fisher, General Counsel and Charles Johnson, Legislative Attorney, General Accounting Office, *Senate Hearings* at 10, *supra*, p. 25) While the latter statement was made during the first Wunderlich hearings, i.e., the Senate hearings, the fact remains that the objections then raised by the GAO were directed against a bill (S. 2487) whose language was virtually the same as the later substitute bill (now the Wunderlich Act) and, as such, that bill, like the Wunderlich Act today, spoke only in terms of “judicial review”.

Much too has been made of the fact that Congress relied upon assurances given it by the Comptroller General before passing the substitute bill (R. Brief of the United States General Accounting Office as *Amicus Curiae* in the Court of Claims at 43-45). But this fact can hardly serve to impress the Wunderlich Act with the meaning the Comptroller General would now ascribe to that law. Except for the conflicting testimony offered by the GAO concerning the significance of omitting any express reference to that office in the proposed legislation (mentioned above) the Comptroller General never ventured to say more of the substitute bill than that it would place his office "in precisely the same situation it was in before the decisions in the Wunderlich and Moorman cases." (*Hbuse Hearings* at 136)

Significantly, that pre-Wunderlich authority was never defined by Congress. The Attorney General has said on this same point that:

Precisely what that independent authority was or should be was a controversial question, as to which Congress deliberately avoided making any decision in the Wunderlich Act. While the legislative history contains some conflicting statements, on balance it does indicate that Congress did not intend to set GAO up as an additional layer of administrative appeal for contractors on disputes clause questions. 42 Ops. Att'y Gen. No. 33 at 6 (1969)

That Congress may not have fully defined the Comptroller General's pre-Wunderlich role in disputes matters does not detract in any way from the only logical conclusion one can attribute to the resulting compromise that became the Wunderlich Act: taking the GAO

out of the bill (S. 24) meant taking the GAO out of the disputes process.

Clearly, this was the understanding of Congressman Willis—a member of the House Subcommittee before whom the final hearings were being held. When one of the witnesses raised the point that the Comptroller General might some day seek to rely upon the legislative history of the compromise bill to upset a Contracting Officer's decision for lack of substantial evidence (the witness had in mind the above-mentioned Comptroller General's statement about equal rights being given to the GAO under either S. 24 or the substitute bill), the Congressman questioned how this could be possible "when GAO has been left out deliberately [from the substitute bill] as compared to S. 24?" (Testimony of Franklin M. Schultz, Attorney at Law, Washington, D. C., *House Hearings* at 110) The witness saw this as a remote possibility; the Congressman saw it as an impossibility.

Nor does the House committee report that accompanied the substitute bill (H.R. Rep. No. 1380, 83d Cong., 2d Sess. (1954)) add any measure of support to the Court of Claims' interpretation of the Wunderlich Act.

That report makes evident what the legislative history itself confirms, namely, that the Wunderlich Act was intended neither to enlarge nor to detract from the powers of the GAO insofar as contracts and change orders were concerned. The report states, in relevant part, that:

The specific intent of this legislation, insofar as it affects the General Accounting Office, is explicitly stated in the letter of December 30, 1953,

from the Comptroller General himself, in which he stated as follows:

With respect to the second mentioned basis of opposition to the pending bills it should be pointed out that the General Accounting Office has not asked for authority which it did not have before the decision in the Wunderlich case. This was made clear in the testimony of representatives of this Office before the Senate subcommittee which held hearings on the somewhat similar bill, S. 2487. In this connection see the committee report on S. 24 (S. Rept. 32) wherein it is stated:

"The committee wishes to point out with respect to the language contained in the bill, 'in the General Accounting Office or a court, having jurisdiction,' that it is not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office, either in the course of a settlement or upon audit; that the language in question is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has."

That was and is precisely the position of the General Accounting Office. (H.R. Rep. No. 1380, 83d Cong., 2d Sess. 7 (1954))

Nothing contained in the report lends even remote support to the idea that the General Accounting Office was to be vested with any authority over disputes decisions. To overcome this, the GAO attempts to draw support from that language in the report which says that the General Accounting Office "as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of

review that are granted to the courts under this bill." H.R. Rep. No. 1380 at 7. Two things may be said of this statement. First, it is factually inaccurate. The GAO never reviewed change orders. Second, the statement on its face negates the very point which the GAO would seek to establish: contracts and change orders are not disputes decisions rendered by Boards of Contract Appeals. Nor are they the same as supplemental agreements which implement such decisions. It is not insignificant to note that the expansive interpretation given to this statement by the GAO was treated with silence by the majority below. The Report specifically states that there "is no intention of setting up the General Accounting Office as a 'court of claims'." (at 7)

Based upon all of the foregoing, it is submitted that the Wunderlich Act was intended to and has the legal effect of achieving two ends.

(1) The judicial review recognized in the first section of that Act (§ 321) was meant to restore to the contractor his right to seek court review of an adverse administrative disputes decision. It was never intended that that section's review standards should be invoked by the Government through the technique of forcing judicial review by withholding payment on a favorable disputes decision in cases where neither fraud nor overreaching were involved.

(2) The statutory prohibition placed against contracting agencies to conclusively determine questions of law, which is covered in the second section of the Wunderlich Act (§ 322), was intended to restore to the General Accounting Office its right to review the legality of contracts and payments under them and, as

such, relates to matters *other* than those inherent in the exercise of the quasi-judicial or discretionary fact-finding authority retained by the contracting agency through the disputes clause. In other words, § 322 precludes an executive agency from extending the disputes clause principle of finality against the Government to contract matters that are primarily non-factual in nature, an example being the question raised in *Morrison-Knudsen Co., Inc. v. United States*, 192 Ct. Cl. 410, 427 F.2d 1181 (1970) where the contractor's claim to an upward adjustment in contract price brought into issue the meaning and application, to social security taxes, of a contract clause providing for reimbursement of federal excise taxes. Resolution of this issue involved no threshold questions of disputed facts. However, where a legal question arises out of facts initially resolved under the disputes clause—the so-called mixed questions of fact and law that are posed by facts arising under the contract—this type of law question would fall beyond the reach of the GAO.⁷

This, we urge, is the only meaning that can and should be given to the Wunderlich Act. Any other interpretation would burden the Wunderlich Act with inconsistencies that neither its language, history, nor common sense could support. But, as matters now stand, there exists the anomalous situation whereby the GAO has been accorded a right to conduct *ex parte* reviews of disputes decisions rendered upon conclusion of adversary proceedings conducted at the appeals

⁷ The statutory scheme envisaged in the Wunderlich Act—which we contend was to leave factual issues relevant to questions “arising under” the contract beyond the reach of the GAO—would be quickly eroded if the GAO were to be permitted to attack disputes determinations by recasting issues that are primarily factual in nature in the mold of “mixed questions of fact and law.”

board level while disputes resolved at the subordinate Contracting Officer level remain beyond that office's reach. Yet, in each case, the dispute resolving authority being exercised by the Government stems from the same source—the agency head.

Further, the clear mandate by Congress that the GAO was not to become another Court of Claims—this the court below accommodated by saying simply that the Comptroller's powers lapse at the Court House door. But clearly, the *effect* of his powers do not. It is meaningless to draw a distinction between the GAO's reversing a disputes decision in favor of the contractor and the GAO's refusing to honor a payment that would implement such a decision. In either case, where the GAO's opposition to a disputes decision is based upon its own evaluation of the evidence, it has exercised a function totally judicial in nature—and one granted the contracting agency alone. And to the contractor, the effect in either case is the same. The decision below forces him to prove his case again.

II

NOTWITHSTANDING THE WUNDERLICH ACT, THE AUTHORITY OF EITHER THE COMPTROLLER GENERAL OR THE DEPARTMENT OF JUSTICE TO INTERVENE IN THE ADMINISTRATIVE DISPUTES PROCESS REQUIRES SPECIFIC STATUTORY AUTHORITY OR A RIGHT GIVEN BY CONTRACT. IN THE ABSENCE OF SUCH RIGHTS, THEIR INTERVENTION RESULTS IN A BREACH OF CONTRACT

The decision below rests upon two grounds. The first is that Congress intended the Wunderlich Act to open up a coextensive right of review of administrative disputes decisions for both the Government and its contractors. The second is that, because of the

Wunderlich Act, it no longer makes any difference how restrictive or limiting the language of a Government contract may be, that language can only be construed as if all applicable statutes are a part thereof. "The minimal bounds of judicial review", said the court below, "must be drawn from the terms, history, and policy of [the Wunderlich Act], not from policies speculatively drawn from the contract clauses which are themselves governed by the statute." (App. 49) In short, powers elsewhere reposed in the Government must be read into every disputes clause.

Our reasons for disagreeing with the Court of Claims' conclusion as to the *meaning* of the Wunderlich Act are set forth fully in the preceding section of this brief. In this section of the brief we take up what the court below saw as the necessary effect of that Act.

The disputes clause in Petitioner's contract (*supra*, p. 5, 6) provided that, in the case of any dispute concerning a question of fact arising under the contract which was not resolved by agreement, the same would be decided by the Contracting Officer and his decision, unless appealed by the contractor to the Commission (or its designated representative) within 30 days, would be final and conclusive. Further, the clause provided that the decision on the appeal would likewise be final and conclusive "unless determined by a court of competent jurisdiction"⁸ to have been fraud-

⁸ The Disputes Clause in Petitioner's contract is an adaptation of the form of that clause in use prior to the enactment of the Wunderlich Act (then referred to as General Provision 6) and was taken from the 1953 edition of the U.S. Standard Form 23-a construction contract. The Disputes Clause in current use (U.S. Standard Form 23-a, 1964 ed.) does not include the former lan-

ulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence.

Nowhere in the language of this disputes clause or in any other language of the subject contract is

guage "unless determined by a court of competent jurisdiction." The current ASPR clause reads as follows:

Disputes (June 1964)

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceedings under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law. (32 C.F.R. § 7.602-6 (1971); see also F.P.R., 41 C.F.R. § 1-16.401; § 1-16.901-23A (1971))

there a basis upon which to support the conclusion of the court below that a final disputes decision rendered at the agency head level could later be attacked by the GAO and the Department of Justice or be disavowed by the very agency that made the decision in the first place. However, since we see the problem of the agency's "disavowal" of its own decision as reaching issues distinct from those posed by the intervention of the GAO and the Department of Justice, we discuss that question in a later section of this brief. We concern ourselves here with that aspect of the Court of Claims' opinion which sanctioned the intervention of the GAO and the Department of Justice in a case where neither fraud nor overreaching was involved.

Neither the GAO nor the Department of Justice were parties to Petitioner's contract with the AEC. The Court of Claims thought this was irrelevant for the reason we have already noted: The Wunderlich Act demands that Governmental powers existing outside of the contracting agency, and not otherwise mentioned in a contract, may, nevertheless, be asserted by the Government and must be allowed to supersede those powers which the contracting parties had reserved to themselves.

The conclusion rests on two premises—each equally wrong. It assumes the existence of a power in the GAO and the Department of Justice which neither of those offices ever had. It negates the basic principles of contract law, and, as such, conflicts with the long held views of this Court on the same matter.

As noted in the first section of this brief, prior to the Wunderlich Act, the GAO never had authority, in the absence of fraud or overreaching, to go behind find-

ings of fact administratively resolved in other branches of the Executive Department and to needlessly (and wastefully) duplicate those efforts by recasting the facts according to its views of a matter. Nor was there any like authority inhering in the Department of Justice. That Department's claim to such authority in this case was based upon 28 U.S.C. § 516; § 519 (*supra*, p. 5) but as Judge Skelton correctly pointed out in his dissenting opinion: "These statutes in no way authorize [the Justice Department] to review and overrule what another executive agency has already decided on matters peculiarly within its jurisdiction and substitute [its] own opinion and decision therefor." (App. 73) We are in complete agreement with these views.

These considerations notwithstanding, and despite the fact that the Wunderlich Act can in no sense be considered a jurisdiction-granting statute (it added no powers to either the GAO or the Department of Justice), the court below implicitly assumed that each of these two Governmental arms was acting within its proper sphere when each separately sought to superimpose its judgment upon that of the administrative head that had decided in favor of Petitioner's disputes clause claims. The court made an assumption that was incorrect.

Furthermore, even if one could conclude that the GAO and the Department of Justice each had (or have) the inherent power to question contract disputes determinations on broader grounds than fraud or overreaching, still, it does not follow that the Wunderlich Act would now permit that authority to be exercised.

The view of the Court of Claims that disputes clauses must be read in light of other applicable statutes is not

a new one. Indeed, it was this very idea—that the powers of the Comptroller General's Office should supersede those of other executive officers and thus allow him to go behind findings that they had made—that was raised and rejected in *United States v. Mason & Hanger Co.*, 260 U.S. 323 (1922).

The question in that case was whether the Comptroller of the Treasury (predecessor to the Comptroller General) could offset, from money otherwise due the contractor, the costs of a performance bond which had been allowed as a reimbursable expenditure under an earlier "cost-plus" contract. The payment sought to be recovered had been approved and made by a Contracting Officer whose authority and decision in the matter—according to the terms of the contract in question—was made final and binding upon both parties subject only to the contractor's right of appeal to the agency head.

The finality of the administrative determination was contested by the Government. In its brief to the Court in that case, the United States argued that "neither a contracting officer nor any other officer of the Government could deprive the Comptroller of the Treasury of his statutory power and duty to see that no money was paid from the Treasury except such as the United States was legally bound pay."⁹ Also it was contended that no contract could lawfully be made which would have such an effect. This argument, in other words, was the same as the rationale used by the court below: Notwithstanding the specific and limiting language of the disputes clause it must be read (and modified) in

⁹ Brief for United States, Petitioner, p. 17, No. 121, Oct. Term 1922, *United States v. Mason & Hanger Co.*, 260 U.S. 323 (1922).

light of statutory powers existing outside of those reposed in the contracting agency.

In *Mason & Hanger*, the Court rejected this argument. It said that the parties could contract to achieve finality and that, over "... decisions, and settlements and payments [made] in consequence of them ... the Comptroller of the Treasury has no power. They were the acts and duty of the officer in charge, in the expression of which there was no ambiguity, and were, therefore, conclusive in effect." 260 U.S. at 326.

There are two aspects of the *Mason & Hanger* decision that bear directly upon and, contradict, the Court of Claims' view of the effect of the Wunderlich Act. First is the principle that guided this Court in reaching its conclusion: The Court saw the issue purely as one of contract law. The Comptroller of the Treasury was without power in the matter simply because the contract reposed complete authority over the payment in the Contracting Officer alone. In upholding the finality, against the Government, of the decision made by one of the contract parties pursuant to a finality clause, the Court said: "This is extending the rule between private parties to the Government." 260 U.S. at 326.

The reasoning and the result underscore the view which this Court has so often declared, namely, that when the United States enters into a contract, it obtains rights and incurs responsibilities similar to those of the private parties to those contracts. *United States v. Standard Rice Co.*, 323 U.S. 106, 111 (1944); *Hollerbach v. United States*, 233 U.S. 165, 171 (1914). In

short, the Comptroller of the Treasury, not having been a party to the contract, was without voice in the matter.

The second aspect of the *Mason & Hanger* decision that is relevant here goes to the fact that, both in its creation and in its enforcement, the agency's contract (i.e., the finality clause) was fully consistent with law. Though this point is not apparent in *Mason & Hanger*, its essentiality to the holding of that case is made clear by what was later said in *United States v. Moorman*, 338 U.S. 457 (1950). In that case, the Court, by way of explaining the long line of decisions upholding contract decisions made pursuant to finality clauses, said: "Contractual provisions such as these have long been used by the Government. No Congressional enactment condemns their creation or enforcement." 338 U.S. at 460.

Taken together, these two considerations affirm the proposition that where a contract itself vests decision-making authority in a contracting agency, and where the exercise of such authority by the agency is not otherwise prohibited by statute, then the contract shall be treated like any other contract made between competent parties. It is a contract between two parties only. Those who would claim a voice in the matter must either be recognized to have that right in the contract itself or else they have no authority to speak. Such is the rule between private parties. *Martinsburg & Potomac R.R. v. March*, 114 U.S. 549 (1885).

Such also is the rule that has always prevailed in contracts with the Government. From the early decision in *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321 (1876) to the recent decision in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966), this Court has consistently viewed the rights

and obligations created under contracts with the Government as a matter to be defined in accordance with the parties' expressed intent. And, seen from this perspective, it mattered little whether the finality of a decision made under the contract was expressed in the form of a settlement as in *United States v. Corliss Steam-Engine Co.*, *supra*, was based upon a Contracting Officer's determination rendered pursuant to a finality clause as in *Mason & Hanger Co.*, *supra*, or derived from a Board determination under a disputes clause as in *United States v. Utah Constr. & Mining Co.*, *supra*. In all these situations, the guiding principle was the same: So long as the power of decision being exercised by the contracting agency (whether through an agency head, a contracting officer, or a contract board) was not prohibited by or inconsistent with statute and so long as it accorded with the expressed intent of the parties, the decision so made was binding upon all.

Has the force and logic of this proposition been changed by the Wunderlich Act? Clearly not.

Today, of course, a contracting agency cannot contract to provide for finality on pure questions of law. Section 322 of the Wunderlich Act expressly prohibits this. But this case does not involve agency determinations on pure legal questions. All that we are concerned with here are agency determinations on disputed fact questions arising under the contract. And, as to such questions, it is still true—as it was when *Manson & Hanger* was decided—that over such matters the parties may contract to achieve finality. The *only* change made by the Wunderlich Act on such questions is that where an agency decision on disputed facts has been otherwise *properly brought before a court by*

either of the contracting parties,¹⁰ that decision may be reviewed under broader standards than those which prevailed at the time *Mason & Hanger* was decided. But does it follow from this, that because there now exists a broader basis for review, as between the contracting parties, that the way is thereby opened for others—not parties to the contract—to intercede and claim for themselves the right to decide anew factual aspects of a contract dispute which the procuring agency alone retained the contract right to judge and decide? The idea flouts the rule of contract law that this Court has *always* adhered to: "... a respect for the parties' rights to contract and to provide for their own remedies." *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966).¹¹

To now allow the United States as a contract party to speak with three voices—all at cross purposes—is to negate the long held view that when the sovereign

¹⁰ Even though § 321 of the Wunderlich Act was intended only for the benefit of contractors and was drafted in terms of the then existing Disputes clause, we do not question the fact that a contracting agency might avail itself of the review standards of that Act in order to secure a review of a decision of its Appeals Board in cases where it has properly reserved that right by appropriate contract language and by necessary changes in its applicable procurement regulations including provision for adequate procedural safeguards to protect against *ex parte* challenges. Whether such a "self-directed" review—which could only lead to protracted litigation—would be wise procurement policy is, of course, another matter. But in this case there was neither such a reservation nor even an attempt by the agency to seek review of its own decision.

¹¹ The cases in point are legion. Citations may be found in the following pertinent decisions: *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966); *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 713 (1963); *United States v. Wunderlich*, 342 U.S. 98, 100 (1951) and *United States v. Moorman*, 338 U.S. 457, 460 (1950).

contracts it becomes bound by the same general principles of contract that govern the relationship between private parties.

The Wunderlich Act was never intended to, nor does it accomplish, such a sweeping result. We submit that § 321 of the Wunderlich Act is in full harmony with the primary principle of this Court's decisions on finality of administrative decisions made under Government contracts. That principle is that, so long as the power of decision being exercised by the contracting agency is not prohibited by or inconsistent with statute (the "facts" disputes clause is not inconsistent with § 321 of the Wunderlich Act) and so long as the exercise of such power is in accord with the expressed intent of the parties (the disputes clause accomplishes this) then the decision so made is not open for reexamination by others.¹²

¹² When the force of this principle is ignored, as it was in this case, then nonexistent distinctions have to be drawn in order to reconcile the complete finality (including immunity from collateral attack) that is accorded to "disputes" resolutions that take the form of a contract settlement or an unappealed contracting officer decision and the lack of virtually any finality that has been accorded to contract board decisions by the opinion below.

Thus, contract compromises or settlements are viewed as binding upon all because they are consistent with the contracting agency's authority and because they accord with the parties' expressed intent. See, *Cannon Constr. Co. v. United States*, 162 Ct. Cl. 94, 319 F. 2d 173 (1963). On the other hand, the binding effect, against the Government, of a contracting officer's decision under the disputes clause (that clause only permits a contractor appeal, it omits a corresponding right on the part of the Government) is rationalized by the Court of Claims as simply a provision that outlines the appellate procedures to be followed within the agency. See, *C. J. Langensfelder & Son, Inc. v. United States*, 169 Ct. Cl. 465, 477, n. 7, 341 F. 2d 600, 607, n. 7 (1965). However, as to board determinations on disputes arising under the contract, these

We think this harmony between the legal principle and the Wunderlich Act is *intentional*. We mean, in other words, that it was precisely this view of the law that guided the drafters of the Wunderlich Act. By prohibiting contracting agencies from extending the disputes clause principle of finality to include pure questions of law, the way was left open for the GAO to assert its authority over contract payments. At the same time, however, taking the GAO out of the first section of the Wunderlich Act was meant to insure that the contracting agencies could continue to fully and finally resolve the factual aspects of disputed matters arising under the contract free from any Governmental second guessing.

The opinion below dealt to a great extent with the question of what the Wunderlich Act was intended to accomplish. We agree that this must be the point of initial inquiry. But the analysis of the problem cannot stop at that point. There remains to be decided whether the Act was sufficient to accomplish the purpose that the Court of Claims sees in that statute. And the answer is no.

Even if one could read the Wunderlich history to support the conclusion that the GAO was meant to have a role in the fact resolution process (in cases other than fraud or overreaching) the Wunderlich Act is clearly inadequate to accomplish that purpose. The history of contract decisions in this Court make plain

become "fair game", open to challenge by all under the holding in this case. Obviously, all these methods of resolving contract disagreements are simply various aspects of one ultimate fact: the agency's right, as a contracting party, to fully and finally settle questions arising under its contract. There is no logic to the various distinctions the Court of Claims indulges in.

the fact that where the decision-making power of an agency is not barred by statute and where, by contract, that power is reserved for exercise by the agency alone, it is not open for others to intercede and claim a superior right. Section 321 of the Wunderlich Act does not prohibit the contracting agencies from writing "fact" disputes clauses into their contracts; hence the Act does not, and cannot, overcome the powers of those agencies to make final determinations. Respect for the integrity of contract is *the* controlling principle; not policies speculatively drawn from the Wunderlich Act.

The only "logic" that can be offered to support the decision below is that asserted by the Comptroller General himself in this case, namely, that his office is vested with authority to speak on disputes matters in the same manner as the courts and exercisable, at his own option, in every instance where a court itself might declare the rights of the parties on a matter which they have properly brought before it. 46 Decs. Comp. Gen. 441, 454-55 (1966).

We know of no decision of this Court that supports the Comptroller General in this unique view of the powers of his office. Nor do we know of any statute that grants this right. The Comptroller General has no more power today than when *Mason & Hanger* was decided and all that Section 321 of the Wunderlich Act could possibly be taken to support is the right of both *contracting* parties to seek review of a disputes decision. That Act speaks only in terms of *judicial review*; it makes no mention of the GAO. It hardly need be added that no more could be said in support of the intervention of the Department of Justice in

this case than was said in behalf of the GAO. Neither were parties to Petitioner's contract with the AEC.

The decision below offers no acceptable basis for rejecting the long held view that a contract is a contract.

This is not to say that the United States is always bound by the letter of its contract. Limitations on the enforceability of contracts as written (and payments made under them) must and do exist in order to secure for the United States the protection of its role as a sovereign. But those limitations are not involved here.

We are not concerned in this case with questions of fraud or overreaching. Similarly, we are not concerned here with the common law right of the United States to recover public money erroneously, wrongfully or illegally paid (or to refuse to make a payment which could be so regarded). That right—which exists independent of statute, *United States v. Bank of the Metropolis*, 40 U.S. (15 Pet.) 377, 401 (1841), and which is assertable either by way of an affirmative action or by counterclaim—applies to situations where payments have been made pursuant to an erroneous conclusion in the construction or application of a statute, and hence, in violation of legal authority, *Wisconsin Central R.R. v. United States*, 164 U.S. 190 (1896), or where the payment reflects an error of law or fact plain on its face. *J. W. Bateson Co. v. United States*, 308 F.2d 510 (5th Cir. 1962). It is a doctrine based upon considerations of justice and fairness and it has absolutely no application to situations where the matter of entitlement to payment on a claim is established upon the resolution of con-

flicting facts heard and decided in a fair adversary proceeding. Indeed, if this doctrine ever had the reach which is claimed for it today (see Brief for The United States in Opposition to S&E Petition for Writ of Certiorari, at 8) there would hardly have been a need for the Government to seek protection, by way of the Wunderlich Act, against binding contract determinations on questions of law such as that involved in *Mason & Hanger*.

Nor does this case involve a contract made in violation of the authorizing statute, which was the situation in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), or one that disregards mandatory procurement regulations as was the case in *G. L. Christian & Associates v. United States*, 160 Ct. Cl. 1, 312 F.2d 418, rehearing denied, 160 Ct.Cl. 58, 320 F.2d 345, cert. denied, 375 U.S. 954 (1963). All that is involved here is an administrative disputes determination made in a contractor's favor, in full accordance with law and applicable regulations, which first the Comptroller General and now the Department of Justice say should have been decided otherwise because they would have weighed and resolved the facts differently from the agency representative who heard and decided the case. Neither of these Government arms had either the inherent power or the contract right to bar the contracting agency from honoring the word of its contract.

III

APPLICABLE PROCUREMENT REGULATIONS CONTRADICT THE COURT'S CONCLUSION THAT THE HEADS OF CONTRACTING AGENCIES MAY DISREGARD THE FINAL DECISIONS OF THEIR CONTRACT APPEAL BOARDS

The court below held that even though a contracting agency may initially have decided a disputes appeal in a contractor's favor, nonetheless, it would still be open for the deciding agency to disavow its own decision and withhold payment—have “a change of heart”, as the court put it—and thereby force the contractor to relitigate his claim in court. (App. 49)

In reaching this conclusion the court rejected the view held by its trial commissioner that there existed an identity between the contract appeals boards and the directing heads of the agencies which make the contracts. It said:

We think the Wunderlich Act and the Supreme Court decisions interpreting it, in attributing finality to the extent they do to decisions of these Boards, necessarily imply an expectation that the Boards, while in the nature of things not as independent as Article III courts, will enjoy a degree of independence approaching and comparable to that of the various independent quasi-judicial and regulatory boards and commissions which, too, can make binding fact findings. (App. 58)

And, “having achieved this”, said the court, “it would be inconsistent and unfair for the law to turn around and pretend that the Board and the Secretary were the same.” (App. 58)

Insofar as the procedural aspects of this case were concerned, the court conceded that, while the differ-

entiation between agency head and contract arbiter was an imperfect one here, (because no board proceeding was involved)¹³ nevertheless, since the hearing examiner who had initially decided Petitioner's claims "had no management functions" (App. 57), the court saw no reason why different "legal consequences should flow from the distinction." (App. 60) Thus, Petitioner's case was made to fit within the court's new rule allowing agency heads to "appeal" decisions of their authorized hearing representatives (the contract boards) by withholding payments ordered under final disputes decisions.

The argument in this section of the brief is directed chiefly against the broad rule, announced in the opinion below, that agency heads may disavow their contractual commitments and be held harmless, by the Wunderlich Act, from the usual consequences that attend all breaches of promissory representations. However, before discussing the points of law involved, and why we believe that rule to be wrong, there should be noted first that the facts of this case simply do not support the application of the rule in the first instance.

That there was an initial decision by a hearing examiner and that he held no management functions is not in dispute. If the hearing examiner's decision on Petitioner's disputes claims was the *only* decision involved on those claims we would need only to argue

¹³ At the time this case was tried (1962), the then existing AEC contract disputes procedures provided that a hearing examiner, instead of a contract appeals board, should hear grievances arising under the disputes provision and render decisions thereon. These procedures, which were set forth in 10 C.F.R. 2.1 *et seq.* (1962), are now obsolete. An Atomic Energy Commission Board of Contract Appeals was established in 1964 (10 C.F.R. 3.1 *et seq.*).

against the correctness of the court's rule and not its application in this particular factual context. But this case did not involve *only* a hearing examiner's decision. Rather, it involved an initial decision of a hearing examiner followed by a later review and decision by the full five-member Commission itself—the head of the agency.

The procedural facts of the case (*supra*, p. 9; App. 1) which are in no way in dispute, show plainly that the Contracting Officer sought, and was granted, an appeal from the hearing examiner's decision which appeal was heard and decided by the Atomic Energy Commissioners.

Although the Commission's review on appeal did not include all the claims which the Contracting Officer had sought to have reexamined, it is clear from the order allowing the appeal that the Commission had considered (and rejected as inadequate) all of the Contracting Officer's arguments in support of a more extensive appeal. (R. Memorandum and Order, November 14, 1963, Atomic Energy Commission, p. 13; 2 AEC Rep. 738, 744)

The proceedings before the Commission resulted in a decision which modified the hearing examiner's one-one claim, reversed him on another and affirmed his decision on the remaining six claims. Thereupon, the matter was remanded to the Contracting Officer with instructions directing him to "diligently" proceed to a final settlement of Petitioner's claims in accordance with the hearing examiner's decision as modified by the Commission's own decision. (R. Decision, Atomic Energy Commission, May 13, 1964; App. 2; 2 AEC Rep. 850, 856) From that date forward, there has

never been a change of position by the AEC on the question of Petitioner's entitlement to payment in accordance with the directions of its own order.

We have raised this factual aspect of the case only to show that the rule laid down by the court below—that agency heads may disavow the decisions of their contract appeal boards (or other authorized delegates appointed to resolve disputes)—simply does not fit into the facts of this case. The claim determinations that are here in issue are those of the agency head—not those of its authorized representative. And those determinations have never been disavowed by the deciding agency. In short, there was no “change of heart”. Thus, if the decision below is to stand, it must do so on the grounds that, either the GAO or the Department of Justice had a right, in and of themselves, to contest the finality of the administrative decision.¹⁴

¹⁴ This factual aspect of the case also brings into focus the role of the Department of Justice in this proceeding. Throughout this brief as well as in our Petition for Certiorari, we have taken the position that, properly interpreted, the decision below grants to the Department of Justice standing to contest an administrative disputes decision independent from that which it might derive through its role as a legal representative of the GAO or the AEC. This too was the view taken by the dissenters below. And it is on this ground—the role of the Department of Justice as a super-reviewing agency—that we saw the need to include the Department of Justice within the framework of the arguments raised herein. The confusion on the point, if there is any, is due, in part, to the fact that the opinion below never quite made clear what was intended by the statement that the Department's “decision to defend [against this suit] was not prompted by any sort of requirement to give mandatory defense to opinions of the Comptroller General, but rather it was the uninfluenced product of the Justice Department's *own* thorough and independent review of the case.” (Emphasis added) (App. 48)

Nor can this ambiguous point be clarified in terms of the Justice Department's arguments on the case. Before the Court of Claims

The decision cannot be made to rest on the theory that the contracting agency repudiated its own decision because, as Judge Skelton quite forcefully points out in his dissenting opinion, that simply did not happen. (App. 61)

Turning now to the broader aspects of the problem, our argument against permitting agency heads to disavow decisions of their authorized contract appeal boards goes to one point only: Regulations currently governing disputes procedures of the Armed Services Board of Contract Appeals and the General Services Administration Board of Contract Appeals (the two contract appeal boards discussed in the opinion below, App. 57) are completely at odds with the court's position. These regulations do establish exactly what the trial commissioner had taken as his premise, namely,

the Department of Justice took the position that the GAO's authority was "totally irrelevant to any issue in the . . . case" (R. Defendant's Request For Review of the Commissioner's Recommended Opinion at 4, 5) and the Comptroller General's intervention was simply the occasion but not the cause of the litigation. (*Id.* at 6, n. 1) At the same time, however, it contended that, "To our knowledge . . . the Commission has not repudiated the decisions involved in this matter" (*Id.* at 14, n. 4) This suggests to us, as it did to the dissenters below, that the Justice Department saw itself rising above any limitations on its power that might flow from a want of authority in those who had precipitated the suit (i.e., the GAO). Today, however, the Department seems to see itself back in its more usual role as an advocate urging the cause of its client—the agency. While apparently agreeing with our views regarding the GAO, namely that Congress *did* refuse to provide for GAO review of disputes clause decisions (Brief for the United States in Opposition to S&E's Petition for Certiorari at 7, n. 5), the Justice Department now claims that the agency *did* disavow its earlier ruling, and that it was this disavowal by the agency that precipitated the proceedings below. (Brief for the United States in Opposition to S&E's Petition for Certiorari at 3, n. 2)

that, for purposes of measuring the finality of a disputes determination at the agency level, there is a legal identity between the arbiter of the contract dispute and the agency head who makes the contract.

In the case of the Armed Services Board of Contract Appeals, for example, its delegated adjudicatory functions vest it with authority to decide disputes clause appeals as "fully and finally" as might each of the several Secretaries of the Armed Services, 32 C.F.R. § 30.1 (1971) and, by regulation, its decisions are deemed to "constitute decisions of the Head of the Department as referenced in the Disputes clause standard in all Government contracts." 32 C.F.R. § 1.314(g) (1971). Nothing in the Armed Services Procurement Regulations supports the conclusion reached by the court below that, despite an all inclusive grant of authority to the contract appeals board, the head of a department has nonetheless reserved to himself the right to diminish the finality of a disputes determination by claiming that that determination was not meant to be his own.

The point is seen even more clearly in the Federal Procurement Regulations applicable to the General Services Board of Contract Appeals (GSBCA). The regulations defining this body's delegated authority state expressly that, *except* in those situations where the Administrator has reserved the right to personally decide a matter and thus, to direct that the authority of the board not be exercised, "The Board has authority to determine appeals falling within the scope of its jurisdiction as fully and finally as might the Administrator himself." 41 C.F.R. § 5-60.101(a); (b) (1971). Here, as in the case of the ASPR's, the contract appeals board speaks for, and in behalf of,

the agency head—and with finality—in all contract disputes matters save those which the agency head has expressly reserved for his own determination.

The coalescence between agency head and contract appeals board that is evident in the regulations delegating authority to the ASBCA and the GSBCA is not restricted to those particular contract boards alone. Nor is the principle of administrative finality on a disputes determination a characteristic exclusive to those boards. Rather, both of these considerations—identity and finality—frame the operative principle underlying virtually all Government contract appeals boards set up to hear contractor grievances brought under a disputes clause.¹⁵

When viewed against this well-defined administrative background, the holding below cannot stand. What the Court of Claims is, in effect, saying is that even though agency heads have issued regulations making their contract appeals boards the *final and exclusive arbiters*

¹⁵ See, as examples, Atomic Energy Board of Contract Appeals—"Decisions of the Board are final decisions of the Commission." 10 C.F.R. § 3.100(a) (1971); Department of Agriculture Board of Contract Appeals—"The decisions of the Board on all matters falling within its jurisdiction shall constitute the final administrative determination within the U.S. Department of Agriculture." 7 C.F.R. § 2400.3(d) (1970); Department of Transportation Contract Appeals Board—"The Board acts for the Secretary in hearing and deciding . . . appeals by contractors . . ." 41 C.F.R. § 12-60.103 (1970); Corps of Engineers Board of Contract Appeals—"The Board is the authorized representative of the Chief of Engineers for the purpose of hearing, considering, and determining, as fully and finally as he might, appeals by contractors from decisions of contracting officers . . ." 33 C.F.R. § 210.5(a) (1971); Veterans Administration Contract Appeals Board—"The Board is delegated authority . . . to render and publish final decisions on appeals entered by contractors . . ." 38 C.F.R. § 1.771(a) (1970).

on disputed contract claims, (and, by so doing, have encouraged reliance upon their decisions by contractors, banks and sureties) nevertheless, the agency head may still refuse to honor such a decision when, in his judgment, the matter should have been decided otherwise. It was precisely this sort of administrative disregard of rights established by promulgated regulations that was condemned by this Court in *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

The question raised in that case was whether the Government could lawfully effect the summary dismissal of an employee in the face of a departmental order that promised greater procedural safeguards. The contention was made that, since the procedural safeguards were merely an act of administrative grace not otherwise dictated by statute, it was therefore open for the executive department to invoke its power of summary termination and dismiss without giving reason. The Court rejected this position, saying, that where the Secretary had chosen to proceed on security grounds he "was bound by the regulations which he himself had promulgated for dealing with such cases even though without such regulations he could have discharged petitioner summarily." 359 U.S. at 540.

The case here, though it deals with contract rights rather than procedural rights, is quite the same. The contracting agencies, as we earlier pointed out (*supra*, p. 58, n. 10) may, by proper changes in contract language and regulation, avail themselves of the judicial review standards set forth in the Wunderlich Act (§ 321), even though (as we claim) that section was intended only for the benefit of aggrieved contractors. But the point is that the contracting agencies have not sought to destroy the finality promised under their

disputes decisions. ~~Head~~ Head, by their present regulations, they have fully committed themselves to the legal position that when the contract appeals board speaks, the agency head speaks too and the decision of the former is binding upon the Government.¹⁶ Present procurement regulations—which have been accorded the force and effect of law, *G. L. Christian & Associates v. United States*, 160 Ct. Cl. 1, 312 F.2d 418, *rehearing denied*, 160 Ct. Cl. 58, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963), leave no room for an agency head to disavow the determination of his cognizant contract appeals board.

This view of the matter demonstrates the error in the Court of Claims' position that, because of the "independence" of the contract appeal boards "it would be inconsistent and unfair for the law to turn around and pretend that the Board and the Secretary were the same." (App. 58) Assuming that the law should look beyond the fact that the members of the contract boards hold their office at the pleasure of the head of the agency, still, whatever independence the contract boards might be seen to have achieved under these circumstances can only be taken as a policy argument in support of a future change in procurement regulations. But it can hardly be taken as a basis upon which to disregard present regulations.

¹⁶ There is one exception to this statement and this exception strongly bears out our point both as to the future availability of the Wunderlich Act for "agency" review of disputes decisions as well as the present finality of disputes decisions against the Government. On March 17, 1971, the Department of Transportation published notice of a proposed change in its procurement regulations that would permit review of Contract Appeals Board decisions adverse to that Department in order to determine whether such decisions should be treated as final. Proposed Dep't Transp. Reg. § 12-1.318-53, 36 Fed. Reg. 5058 (1971).

CONCLUSION

In *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966), this Court said:

"... Pre-eminently, this policy [of utilization of the administrative procedures contractually bargained for] is grounded on a respect for the parties' rights to contract and to provide for their own remedies. See *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 16 L.Ed. 2d 642, 86 S. Ct. 1545; *United States v. Moorman*, *supra*, 338 U.S. at 461-462, 94 L.Ed. at 259, 260. But, beyond that, there is also a belief that resort to administrative procedures is an expeditious way to settle disputes, conducive of speed and economy. *United States v. Blair*, *supra*, 321 U.S. at 735, 88 L.Ed. at 1043. Such procedures also facilitate a department's supervisory control over contracting officers and perhaps enhance the possibility of harmonious agreement."

We ask the Court to reaffirm these principles by overturning the interpretation that the court below has given to the Wunderlich Act. Only by so doing can there be avoided further inter-Governmental conflict and the disastrous impact on Federal contractors of the sort that occurred in this case where disputes clause determinations in favor of a contractor have been marred by burdensome litigation and have remained unpaid for nearly a decade.

There was a full and fair adversary proceeding held on the claims in issue and the contracting agency accepted the result of that proceeding. *Ex parte* reconsideration of the administrative determination by others can secure the Government no meaningful added protection. It is a policy of waste and never-ending litigation.

Indeed, if the Government wants to rewrite procedures and set up appellate rights with appropriate indemnifications and safeguards in the future, it has the power to do so. But, in this case, it is bound by its contract. It has breached that contract and the Court is asked to so hold, to remand the case to the Court of Claims and direct it to grant Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

NO. ~~1398~~

S & E CONTRACTORS, INC., Petitioner

v.

THE UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

BRIEF AMICUS CURIAE OF
PROFESSOR HAROLD C. PETROWITZ
IN SUPPORT OF PETITIONER

Harold C. Petrowitz
American University
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

NO. 1298

S & E CONTRACTORS, INC., Petitioner

V.

THE UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

~~BRIEF AMICUS CURIAE OF~~
~~PROFESSOR HAROLD C. PETROWITZ~~
~~IN SUPPORT OF PETITIONER~~

PRELIMINARY STATEMENT

This brief is filed by Professor Harold C. Petrowitz, who is admitted to practice before this Court, as amicus curiae, pursuant to the written consent of the Petitioner and Respondent which is on file with the Clerk of this Court.

CERTIFICATION

I hereby certify that I have this day mailed three copies of this brief to Geoffrey Creyke, Jr.,

attorney of record for the Petitioner, and to the Honorable Erwin Griswold, Solicitor General of the United States, attorney of record for Respondent.

July 1, 1971

Harold C. Petrowitz
Harold C. Petrowitz

THE INTEREST OF PROF. HAROLD C. PETROWITZ

Professor Petrowitz strongly supports the position of petitioner.

The decision of the Court of Claims, below, will have a disruptive effect on the orderly development of an important segment of administrative law by introducing great uncertainty into the degree of finality attaching to decisions rendered by federal agencies in contract disputes. This will have an adverse long-run effect because the climate presently favorable to the orderly settlement of government contract disputes will be adversely affected. With the present and projected high level of Government contracting, this is a matter for grave public concern and for particular concern of the industrial community, members of the bar and the courts. It is also a matter of grave concern for members of the academic community who are interested in improving the administration of justice and in elevating the efficiency of the judicial system.

Also of concern to members of the academic community and members of the bar is the threat posed to sanctity of contract by the implications of the decision below.

ISSUES

The facts of this case have been well stated in the brief of the petitioner. The essential references are contained in the Appendix and in petitioner's brief.

This is one of those cases in which the issues - relatively simple at the start - have increased in complexity at each level of controversy: the contracting agency; the Comptroller General; and the Court of Claims.

The original issue in this case can be concisely stated: can a contracting agency with impunity refuse to implement its own decision favorable to the contractor rendered pursuant to the Disputes clause of one of its contracts?

An additional issue was injected almost immediately because the refusal by the agency to implement its decision was the direct result of a ruling by the General Accounting Office reviewing and rejecting the entire claim based on its appraisal of the evidence and legal interpretation of the contract and directing the certifying officer not to issue any payment vouchers in settlement thereof. This raised the question of whether the General Accounting Office in reviewing and denying the entire claim on the basis of Wunderlich Act (41 U.S.C. §§321-22) criteria rather than ruling only on the points raised by the certifying officer acted beyond the scope of its statutory authority.

A final issue was added by the majority opinion of the Court of Claims: can the Government obtain court review of an administrative decision rendered under the Disputes clause in accordance with the criteria laid down in the "Wunderlich Act,"

68 Stat. 81 (1954), 41 U.S.C. §§321-322 (1964)? By answering this question in the affirmative, the Court of Claims cast doubt on the efficacy of the entire administrative structure established for the purpose of resolving government contract controversies.

ARGUMENT

Summary

There has developed in connection with Government contracts a procedure for the resolution of controversies arising under the contract known as "disputes procedure" that brings into operation well-known principles of administrative law. This procedure depends for its success on a relatively expeditious and inexpensive method of securing a remedy to the contractor in exchange for a giving up of the right on the part of the contractor to abandon contract performance and sue in court for breach of contract damages. In order for the system to work, the contractor must have confidence that the administrative process will accord fair and expeditious consideration of valid claims with the reasonable assurance of a prompt and meaningful remedy. Only if this administrative process has a predictable cut-off point free from second-guessing and collateral attack will it be attractive to the contractor who gives up his common-law remedies in exchange for it.

The argument discusses in detail whether a contracting agency can with impunity refuse to implement its administrative decision favorable to the contractor rendered under established disputes procedure on the basis of a collateral adverse ruling

on the merits of the claim conducted on its own initiative by the General Accounting Office and thus force the contractor into court to gain the remedy already administratively decreed. The conclusion is reached that the Government cannot do this without subjecting itself to liability for breach of contract.

INTRODUCTION

It is significant that in this case the final decision under the Disputes clause was rendered not by a contract appeals board but by the head of the agency (the Atomic Energy Commission). This decision was never changed or revoked. The Atomic Energy Commission simply refused to implement its decision which was largely favorable to the contractor. This point is of interest because the majority decision of the Court of Claims speaks extensively of administrative boards instead of agency heads.

Actually the legal framework of this case would not have been altered if the final agency decision had been rendered by an administrative board because most of these boards are delegated authority to decide appeals taken pursuant to contract disputes clauses as fully and finally as can the heads of the agencies whom they represent. See e.g. 32 C.F.R. §30.1(1970) and 41 C.F.R. §5.60.101(1970). Although it is clear that the agency head can revoke this authority in the same manner as it was conferred, once an administrative board renders a decision pursuant to such a grant of authority, that decision becomes the final agency determination from the moment it becomes official. When the board procedure is employed, therefore, this grant of authority constitutes the board as the alter ego or agent of the agency head

for the purpose of deciding controversies under the Disputes clause of contracts.

It is equally clear that administrative jurisdiction to decide appeals under the Disputes clause is contractual. It is a procedure that a party who contracts with the Government accepts as a trade-off for agreeing to continue with contract work as unilaterally directed by the contracting officer.

I.

Can a contracting agency with impunity refuse to implement its own decision favorable to the contractor rendered pursuant to the Disputes clause of one of its contracts?

The language of the Disputes clause states that the decision by the agency head or the duly authorized representative thereof "... shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." Used in this context the "conclusive" means that the decision is binding on the agency (unless determined to be arbitrary, etc.), and there is a clear implication that the decision will be carried out with reasonable promptness as part of the Government's obligation under the contract. Viewed in this light, a refusal by the agency to implement a valid administrative decision rendered pursuant to the contract Disputes clause would be a clear breach of contract. There can be no doubt, then, that if the Government refused to implement its final decision in this case without justification found either in the contract or in statute, the contract was

breached and the Government must answer in damages. It is obvious that a contractor would be foolish in agreeing to a disputes procedure that is incapable of securing for him an expeditious and meaningful remedy. The collateral attack on agency decisions under the Disputes clause and the refusal to implement them invited by the decision of the Court of Claims in this case is certain to work a serious hardship by increasing the degree of risk the contractor must assume. This will, in the long run, discourage industry participation in the Government market place.

II.

Did the General Accounting Office in reviewing and denying the entire claim on the basis of Wunderlich Act criteria rather than ruling only on those points raised by the certifying officer act beyond the scope of its statutory authority?

Since the refusal by the agency to implement its decision was the direct result of a ruling by the General Accounting Office, it must now be determined whether that office acted appropriately under the circumstances and whether its decision was valid and binding.

This case came before General Accounting Office (GAO) when the certifying officer in the Atomic Energy Commission (AEC) sought its advice on two relatively minor points of law related to the decision on the dispute rendered by the Commission. Instead of ruling on the two questions thus raised, the General Accounting Office spent 33 months reviewing the entire AEC decision and then issued a

ruling to the effect that no part of the contractor's claim should be paid, thus reversing the administrative decision.

In referring the two points to GAO for a ruling, the certifying officer was acting pursuant to a 1941 statute, the purpose of which was to clarify the role of certifying officers, 55 Stat. 876, (1941), 31 U.S.C. §82d (1964), Petitioner's Brief p. p. 4-5. Its legislative history makes clear that this statute was not enacted to enlarge the authority of GAO, but rather to minimize the risks assumed by agency officers charged with the duty of certifying payment vouchers. The Comptroller General himself has stated that this legislation did not confer jurisdiction on GAO to render a decision to a certifying officer on general questions, 27 Comp. Gen. 222, 223 (1947). There can be no doubt that the General Accounting Office had authority to rule on the questions of law presented to it by the certifying officer.

But GAO did not limit its review of the matter to the questions referred to it by the certifying officer. Purporting to act under authority conferred by the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U.S.C. §71 (1964), and the "Wunderlich Act," 68 Stat. 81 (1954), 41 U.S.C. §§321-22 (1964), (Petitioner's brief p. p. 3-4), the General Accounting Office reviewed the entire AEC decision and reversed it.

The only pronouncement that has been made by this Court relating to the power of the Comptroller General "to settle and adjust" all Government accounts occurred in United States v. Mason and Hanger Co., 260 U.S. 323 (1922), a case that actually involved the Comptroller of the Treasury, the immediate predecessor of the Comptroller General. In that case this Court held that the parties could by

contract reserve to the contracting officer the right to make a final decision regarding the allowability of costs chargeable to the contract. The opinion did not mention any specific statute but seemed to reflect an overall assessment of the authority of the Government officials involved.

The interesting thing is that no federal court decisions handed down between 1922 and 1965 departed substantially from the rule laid down in United States v. Mason and Hanger, *supra*. See e.g. Jos. Graham Mfg. Co. v. United States, 91 F. Supp. 715 (N.D. Cal. 1950); John H. Mathis Co. v. United States, 79 F. Supp. 703, 708 (D.N.J. 1948); Livingston v. United States, 101 Ct. Cl. 625, 638 (1944); Zweig v. United States, 92 Ct. Cl. 472, 482 (1941); McShain Co. v. United States, 83 Ct. Cl. 405, 409 (1936). These decisions all have in common a reiteration of the rule that the Comptroller General cannot overrule an essentially factual determination by a contracting agency rendered pursuant to contractual agreement. This line of court decisions appears to stand solidly for the proposition that, although the Comptroller General has the power to rule on specific matters of law referred to him by certifying officers and to determine whether appropriated funds have been expended in accordance with law, he does not have authority to review, as might a court, administrative decisions having a high degree of factual content rendered pursuant to contractual agreement unless there has been fraud or overreaching.

Then in 1954 the so-called Wunderlich Act was passed, 41 U.S.C. §§321-22 (1964) (Appellant's brief p. 3). This statute overruled the decisions of this court in United States v. Moorman, 338 U.S. 457 (1950) and United States v. Wunderlich, 342 U.S. 98 (1951) and established a generally recognized

standard of "appellate" review to administrative decisions rendered pursuant to the Disputes clauses of government contracts. The Comptroller General, both in his decision overruling the AEC in the instant case and in his amicus curiae brief to the Court of Claims has taken the position that the Wunderlich Act conferred on GAO the same authority to review administrative decisions as that Act confers on a court. This contention has no sound basis either in fact or in law.

In the first place, the primary thrust of the Wunderlich Act was to instill in contractors' minds confidence that they would receive fair treatment with adequate procedural safeguards as part of the disputes machinery they had to agree to in accepting a Government contract. The whole context of Section 321 relates solely to court appeal. The words "suit", "pleaded" and "judicial" are used explicitly and there is no reference to the Comptroller General or to the General Accounting Office. Nor was GAO mentioned in the original draft of the legislation. GAO was mentioned expressly in an intermediate draft of that part of the legislation that now corresponds to Section 321, but, in the final version of this section, the reference to GAO was deleted.

What is now Section 322 of the Wunderlich Act was not in the original draft of the legislation but was added to early revisions at the urging of GAO and others. (Hearings Before a Subcommittee of the Senate Committee on the Judiciary, 82nd Cong. 2d Sess, 1952). This section states simply and enigmatically that no Government contract shall contain a provision making final on a question of law any administrative decision. There is no indication that

this section applies to GAO, nor is any other qualification placed on it. The two sections of the statute taken together define almost perfectly the ordinary criteria for appellate court review of the decision of an administrative tribunal or a trial court sitting without a jury.

The legislative history of the Wunderlich Act (discussed exhaustively in Petitioner's brief p. p. 24-49) is not voluminous, but has been cited at various times and places to buttress an astounding variety of interpretations of this statute. By being sufficiently selective in citing from this legislative history, it is easily possible to support diametrically opposed views of what this legislation was intended to accomplish.

After weighing carefully the entire legislative history of the Wunderlich Act, it is possible to reach the following conclusions:

1. Section 321 was intended solely to free contractors from the limitations on court review of administrative decisions imposed by the decision in *United States v. Wunderlich*, supra. It was not intended to establish the General Accounting Office as a "Court of Claims".
2. Section 322 of the Act was intended to restore to the courts the full scope of appellate review of administrative action and to assure the General Accounting Office of its right to determine that appropriated funds are expended in accordance with the law. This represents the recognized jurisdiction conferred on GAO by the Budget and Accounting Act of 1921.

3. The Act is clearly not jurisdictional. There is no indication whatever that Congress intended to confer on the Government the right to initiate review of administrative decisions to which the Wunderlich Act applies. Indeed, there is no record of the Government ever having initiated in any court an appeal of administrative action on the basis of the Wunderlich Act, nor has the Government contended so far in this proceeding that it has this right.

Therefore, it must be concluded that the General Accounting Office acted beyond its authority in reversing on the basis of Wunderlich Act criteria the administrative decision rendered by AEC and directing that agency not to make payment on any of Petitioner's claims.

III.

Can the Government obtain court review of an administrative decision rendered under the Disputes clause in accordance with the criteria established by the Wunderlich Act?

The Government appears to concede that it cannot initiate a court appeal under the Wunderlich Act by the fact that it has never done so. This position also appears to constitute recognition of the well-established principle that the Government cannot sue itself.

The only means remaining by which the Government can obtain the appellate review specified by the Wunderlich legislation is for the contracting agency to refuse to implement its

own administrative decisions - either on its own initiative or as the result of collateral attack by GAO as occurred in the instant case - and force the contractor to go to court to obtain the remedy decreed at the agency level. This is the approach sanctioned by the decision of the Court of Claims below.

This backhand method of securing review of an administrative decision is basically unfair. It forces the contractor to run the risk of delay and expensive litigation in order to obtain the remedy it contracted for and for which it gave up important common-law rights. Such a rule also encourages the contracting agency to renege on its agreements in the hope of either obtaining the reversal of a decision favorable to the contractor or of running the contractor out of money because of delay in securing payment. There is the constant threat that the Government will litigate the contractor to death as actually happened in this case.

This is not to say that the Government by its chosen instrument, the Department of Justice does not have the right to defend fully any legal action brought against it. The Government should always have this right. All that is being said here is that the contracting agency ought not to renege on its own decision and that the General Accounting Office does not have the authority to intervene under the circumstances of this case. Nor should the Department of Justice presume to "advise" the contracting agency concerning the desirability of forcing the contractor into court by refusing implementation of the administrative decision. This is collateral interference

without any foundation in statute of the same sort as was represented by the intrusion of the General Accounting Office in the instant case. It is the function of the Department of Justice to defend the Government against suits against it and to initiate legal action where authorized to do so by statute. The Department of Justice is not authorized by statute to interfere with the contractual rights of contractors with the Government and to generate litigation thereby.

Actually the Government has a common-law right so declared by this Court to initiate legal action to recover public funds wrongfully, erroneously or illegally paid, United States v. Wurts, 303 U.S. 414, 415 (1938). This rule was recently reaffirmed by a federal court in United States v. Bateson, 308 F.2d 510, 514 (5th cir. 1962).

CONCLUSION

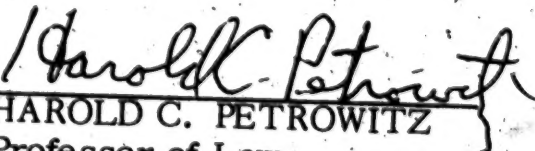
An orderly contracting process requires this Court to overturn the interpretation that the court below has given to the Wunderlich Act and the technique the Government may employ to invoke its application.

The administrative procedure now employed for resolving disputes arising under Government contracts has evolved over a substantial number of years by trial and error. In 1954, it became necessary to make a correction by means of legislation - the Wunderlich Act.

If the process has once again gotten out of joint, the remedy is through legislative action and not by means of the strained interpretation given the law by the court below.

As far as this case is concerned, it is urged that this Court find that the Government has breached its contract with Petitioner and remand the case to the Court of Claims, with directions to grant Petitioner's motion for summary judgment.

Respectfully submitted,


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Washington, D. C.
June 29, 1971

70-88

Supreme Court, U.S.
FILED

JUL 1 1971

E. ROBERT SEAYER, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 1898~~

S & E CONTRACTORS, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Claims

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE
IN SUPPORT OF THE PETITIONER**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

No. 1398

S & E CONTRACTORS, INC., *Petitioner*,
v.
THE UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Claims

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE
IN SUPPORT OF THE PETITIONER**

PRELIMINARY STATEMENT

This brief is filed by the American Bar Association as *amicus curiae*, pursuant to the written consent of the Petitioner and Respondent which are on file with the Court.

OPINION BELOW

The opinion of the Court of Claims and the two dissenting opinions are reported at 433 F.2d 1373 and are also reproduced at pages 45 through 97 of the Parties' Joint Appendix. It was a 4-3 decision.

QUESTIONS PRESENTED

This controversy concerns whether the Court of Claims has correctly read and applied the "Wunderlich" or "Anti-Wunderlich" Act,¹ 41 U.S.C. §§ 321-22. That Court extended to the Government the same right to obtain judicial review of Government procurement agency decisions favorable to contractors under the standard Government contract "Disputes" clause, as that Act affords contractors who are aggrieved by such agency decisions. The Court of Claims in this case has thus opened the door to full judicial review of the decision of the Government procurement agency, the Atomic Energy Commission, favorable to Petitioner, even though the Atomic Energy Commission has never repudiated or disavowed it.² Thus the questions presented include the following:

1. Does the Wunderlich Act require that the courts accord the Government judicial review of

¹ So popularly named because of its legislative purpose to overturn the decision of this Court in *United States v. Wunderlich*, 342 U.S. 98, 96 L.Ed. 113 (1951). See, e.g., H.R. Report No. 1380, 83d Cong., 2d Sess. 1 (1954) ("The purpose of the proposed legislation, as amended, is to overturn the effect of the Supreme Court decision in the case of *United States v. Wunderlich* (342 U.S. 98), rendered on November 26, 1951, under which the decisions of Government officers rendered pursuant to the standard disputes clause in Government contracts are held to be final absent fraud on the part of such Government officers.")

² The Commission's decision was administratively set at naught by the Comptroller General who ruled Petitioner was not entitled to recovery on its claims and that the Commission decision to the contrary was not entitled to finality under the Wunderlich Act, with the result that the Commission's decision was never implemented by any payment to Petitioner. 46 Dec. Comp. Gen. 441 (1966). In the court below the Department of Justice asserted the same conclusion on its own behalf. See dissenting opinion below of Judge Skelton. The Parties' Joint Appendix at p. 61 *et seq.*

Government procurement agency decisions favorable to contractors under the standard "Disputes" clause, coextensive with that made available to contractors by that Act?

2. Does the standard "Disputes" clause of Petitioner's contract, consistent with the Wunderlich Act, make Government procurement agency decisions under that clause favorable to Petitioner binding on the Government so as to foreclose judicial review thereof under the criteria of that Act?

3. Does the decision of the Atomic Energy Commission favorable to Petitioner under the standard "Disputes" clause of Petitioner's contract constitute or amount to a contractual agreement on, or settlement of, the dispute that is binding on the Government, irrespective of the Wunderlich Act, in the absence of allegations of fraud, bad faith, or illegality?

4. Do the answers to the foregoing depend on whether the Government procurement agency has, or has not, as in this case, disavowed, repudiated, or refused to carry out its decision favorable to Petitioner?

THE STATUTES AND CONTRACTUAL PROVISIONS INVOLVED

1. The Act of May 11, 1954, 68 Stat. 81 (The Wunderlich Act), 41 U.S.C. §§ 321-322) provides:

"§ 321. Limitation on pleading contract-provisions relating to finality; standards of review.

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized repre-

sentative or board in a dispute involving a question arising under such contract, *shall be pleaded* in any suit now filed or to be filed *as limiting judicial review* of any such decision *to cases where fraud* by such official or his said representative or board *is alleged*: *Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.* (Emphasis added.)

“§ 322. *Contract-provisions making decisions final on questions of law.*”

“No Government contract shall contain a provision making final on a question of law the *decision* of any administrative official, representative, or board.” (Emphasis added.)

2. The standard “Disputes” clause of Petitioner’s contract provided as follows:

“*Disputes*

“(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer *shall be final and conclusive* unless, within 30 days from the date of receipt of such copy, the Contractor, mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission or its duly authorized representative for the determination of such appeals *shall be final and conclusive* unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as

necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. *Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.*

“(b) This ‘Disputes’ Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.” (Emphasis added.)

3. The pertinent provisions of the Budget and Accounting Act concerning the General Accounting Office, 31 U.S.C. §§ 71, 74, 82d, and of the statutes relating to the Department of Justice, 28 U.S.C. §§ 516, 519, are set forth in Appendix A hereto.

THE INTEREST OF THE AMERICAN BAR ASSOCIATION

The American Bar Association strongly urges reversal of the decision below in this case.

By overturning some 45 years of administrative practice of according finality to decisions of procurement agencies favorable to contractors, the decision below appears to threaten the process of settlement of disputes between the Government and its contractors, and to undermine the finality of settlements made (absent allegations of fraud, bad faith or illegality). Because of the vast scale of Government procurement and the obvious public importance of encouragement of the settlement of Government contract disputes, the

American Bar Association urges the Court to reverse the decision below.

✓ The bases of these concerns are illuminated by the dissenting opinions below. Thus, Judge Collins wrote in part:

"A brief look at the realities of the disputes procedure reveals that Congress could never have intended that the [Wunderlich] Act be read as the court reads it. When a dispute arises between a contractor and the Government, the 'disputes' clause sets out clearly the procedure to be followed. First, the parties may voluntarily settle the dispute. If they do, that is the end of the matter. If no settlement is reached, the disputed matters are decided by the agency's contracting officer. If the contractor does not appeal to the agency from the contracting officer's decision within the prescribed time, that, again, is the end of the matter. If, however, the contractor does appeal to the agency, then, according to the court, a decision rendered by the agency or its board favorable to the contractor is not the end of the matter; the agency is free at any time to disavow or repudiate its own decision, thereby forcing the contractor to sue. *The anomaly created by the court's decision is too obvious to need elaboration.* While an agency will still be bound by the decisions of its contracting officers, it will not be bound by decisions made at the highest level." (See Parties' Joint Appendix, pp. 93-95; emphasis added, footnotes omitted.)

Judge Collins' dissent next pointed out an example of the mischief of the Government's disavowal of its decisions favorable to contractors:

"The suggestion that the Government, after deciding a contract dispute with one of its contractors in favor of the contractor, can then

promptly disavow that decision carries with it an enormous potential for mischief. It means that the Government, after deciding that its contractor's claim is meritorious, based on a *preponderance* of the evidence presented to it, can then turn around and reject the claim because there is *substantial* evidence (i.e., less than a preponderance) to support the opposite result. The majority opinion puts a tremendous economic burden on Government contractors who are now faced with the prospect of prolonged judicial proceedings in order to collect funds to which the agencies have already found them entitled. After today's decision the Government would be foolish to pay *any* board awards." (*Id.* at 95; emphasis in original.)

Finally, Judge Collins notes the devastating effect of the court's having destroyed the finality of agency board decisions favorable to contractors:

"Moreover, the court's decision will utterly defeat the purpose and utility of the 'disputes' clause, which has served admirably over the years, and will seriously hamper the Government in virtually all its activities whenever it is forced to call on the resources of private firms. The purpose of the clause has been to promote the expeditious performance of Government contracts. By destroying the finality of board decisions favorable to contractors, the court has assured that the performance of Government contracts will be anything but expeditious. Protracted and expensive litigation has never been known for its beneficial effect on contract performance." (*Id.* at 96.)

Also pertinent to the interest of the American Bar Association as *amicus curiae* is the concern over the role played by the Department of Justice in this case as expressed by the dissenting opinion of Judge Skelton, joined by Chief Judge Cowen and by Judge Col-

lins, who wrote in part (See Parties' Joint Appendix, p. 81):

"The Attorney General, in effect, urges that the parties here are entitled to their 'day in court' on the finality issue and on the merits. At first blush, this is appealing to the American sense of justice and fair play. However, when it is applied to the facts and procedures in this case, it loses its appeal. The plaintiff does not want a hearing in court. All he wants is the enforcement of the decision and to be relieved of interdepartmental squabbling over powers and duties. The AEC, the only other party to the suit, has had the questions involved in the case heard *four* times already, by those authorized by the contract to hear them, namely, the contracting officer, the examiner and twice by the AEC itself, all of whom represented the Government. The AEC has not asked for a court hearing on whether or not its decision is final nor on the merits, and, if it could speak out, it would no doubt oppose it. That only leaves the Attorney General, who is not a party and who appears in the case as an attorney. He wants a hearing in court to enable him to assert a theory contrary to the decision of his client, the AEC. His argument is unpersuasive."

Judge Skelton then noted the harm to the disputes process from permitting the Attorney General to proceed on his own:

"The effect of the majority opinion is to allow the Attorney General *sua sponte* to appeal from the decision of another executive agency adverse to the government for the purpose of overturning it, and, by dicta, authorizes him to similarly appeal from an adverse Board decision for the same purpose. Such a procedure imposes an additional layer of bureaucratic red tape that contractors must overcome before they receive final decisions

along the administrative trail on their claims under the disputes clause in government contracts. It easily adds from one to three years, and perhaps more, to the already extended period of time for processing a contractor's claim. Under such a system, how can a knowledgeable contractor afford to do business with the government?" (*Id.* at 81-82; emphasis in original.)

There thus appears to be at stake large issues of public importance which also touch upon the business required to come before the Court of Claims and the other Federal courts in these times of clogged court backlogs. If this case can properly be viewed as one in which Petitioner and the Government acting through the agency empowered to contract with Petitioner have settled, or agreed upon, Petitioner's entitlement to recover on its claims, then this case (and others like it)³ would appear to have no business in the courts on judicial review under the criteria of the Wunderlich Act. The interest of the American Bar Association thus suggests that this Court should determine that that Act does not require such an expenditure of judicial resources for the reasons indicated.

STATEMENT

In August 1961 Petitioner, as the lowest responsible bidder after formal advertising for bids, was awarded a contract by the Atomic Energy Commission to construct a testing facility at the National Reactor Test Station in Idaho. Under the original contract, the work was to be completed by February 6, 1962, and Petitioner was to receive \$1,272,000 as the fixed con-

³ We are advised that at least two other cases now pending in the court below raise substantially similar issues.

tract price. Various contract modifications increased the contract price to \$1,364,794.70 and extended the work until March 25, 1962. Petitioner completed the work, and it was accepted by the Government in June 1962.

Petitioner submitted seven claims⁴ under the contract to the Contracting Officer who denied all of them under the contract's "Disputes" clause.⁵ Petitioner then appealed the denial of the claims to the Atomic Energy Commission which referred them to a Hearing Examiner of the agency for the holding of a hearing and the preparation of a report.⁶ By decision dated June 26, 1963, the Hearing Examiner found that Petitioner was entitled to recover on the seven claims in issue. This decision was substantially affirmed by the Atomic Energy Commission itself on May 13, 1964, as shown by its Order entered that date which provided as follows:

"The proceeding is remanded to the contracting officer with instructions to proceed to final settlement or decision in accordance with the decision of the hearing examiner dated June 26, 1963, as modified by our order of November 14, 1963, and by this decision."⁷

Indeed, this Order largely repeated the Commission's previous Order of November 14, 1963 directing the contracting officer "to effect promptly equitable ad-

⁴ Originally, Petitioner presented nine claims totalling approximately \$1,950,000. Only seven of them were urged below.

⁵ The text of this clause appears at pp. 4, 5, *supra*.

⁶ At that time the Atomic Energy Commission had not established a Board of Contract Appeals to act for it on contract disputes.

⁷ See Parties' Joint Appendix, p. 63.

justments and payments to which the Appellant [the Petitioner] is entitled.”⁸

As shown by the report of the Commissioner to the Court of Claims (Parties’ Joint Appendix, pp. 35-36), the following events ensued:

“Subsequently, on March 4, 1964, a certifying officer in the employ of the Commission requested advice from the General Accounting Office (‘GAO’) with respect to the certification of a voucher for the making of a payment in the amount of \$32,297.73 to the plaintiff under the contract. The amount set out in the voucher was said to represent three sums withheld from the plaintiff, *i.e.*, \$22,280 withheld because the plaintiff allegedly owed such amount to a supplier of aggregate, \$8,366.19 withheld because of the Government’s possible liability to another contractor, and \$1,651.54 withheld because of an alleged indebtedness by the plaintiff to still another contractor for telephone services.

“It will be noted that the voucher which the certifying officer submitted to the GAO for advice covered two of the items that had been involved in the plaintiff’s ‘retainage’ claim before the hearing examiner and the Commission (although there was a variance in the amount of one of these items), but it did not cover any proposed payment of any of the seven claims that are involved in the present review proceedings.

“On December 5, 1966, the GAO advised the certifying officer in decision No. B-153841 (46 Comp. Gen. 441) that it would be improper to certify the voucher which had been submitted to the GAO, because (according to the GAO) the plaintiff did not have a valid claim for any additional compensation under the contract.

⁸ See Parties’ Joint Appendix, p. 35.

"The GAO reviewed at great length the hearing examiner's report and the Commission's actions on all of the plaintiff's claims, including the 'access,' 'concrete,' 'steam,' 'weather,' 'acceleration,' and 'backfill' claims, which are summarized in parts II-VII of this opinion. The GAO expressed the opinion that the administrative decisions favorable to the plaintiff in connection with these claims were not supported by substantial evidence."

"Relying on the opinion expressed by the GAO, the Commission thereafter refused to take any further action on the plaintiff's claims. As a consequence, the plaintiff has never received the administrative relief which, according to the Commission's decisions, the plaintiff was entitled to receive on the claims described in parts II-VII of this opinion." (Footnote omitted).

Thereafter, on April 11, 1967, Petitioner commenced this action in the court below. On November 30, 1970, the court below decided that the Government was entitled to judicial review, under the criteria of the Wunderlich Act, of the merits of the entitlement decisions of the Atomic Energy Commission favorable to Petitioner on its claims. In its present posture below, the case is on remand to the Commissioner of the Court of Claims "for his consideration and report on the various claims under Wunderlich Act standards."¹⁰ As pointed out in the Petition for Certiorari, as "a consequence of the Government's delay in payment in this case, the Petitioner has been unable to continue in business."¹¹

⁹ The GAO further asserted that "The Examiner's decision contained serious errors of law." See Petition for Certiorari, App. C at C-47.

¹⁰ See Parties' Joint Appendix, p. 61.

¹¹ See Petition for Certiorari at 10.

ARGUMENT

The Strongest Reasons of Public Policy Suggest That the Court Should Clarify the Roles of the Courts, the Contracting Agencies, the Department of Justice, and the General Accounting Office so as To Accord Contractual Finality to Disputes Clause "Decisions" or Settlements at the Agency Head Level Favorable to Contractors in the Absence of Fraud, Bad Faith or Illegality.

The Court should resolve the competing contentions as between the contractual finality to be accorded administrative settlements of contract disputes at the agency head level and payment thereon on the one hand, and the contention that Congress has mandated that such settlements (and payments) when resulting from decisions at the agency head level favorable to contractors should be made subject to judicial review at the Government's election (even by the Attorney General *sua sponte*).

Four judges of the court below were of the view that the Wunderlich Act and its history manifested a Congressional purpose to accord the Government the right to full judicial review of its own agencies' decisions under the criteria of that Act. Three judges of that court dissented from that pronouncement.

1. **The Holding Below Has No Support in the Words of the Statute; the Wunderlich Act Was Only a Command to the Government Not To Plead the Disputes Clause as "Limiting" Judicial Review to Fraud Cases. It Conferred No Right of Judicial Review on the Government:**

The holding of the court below that the Wunderlich Act confers a right of judicial review on the Government, coextensive with that conferred on the contractor, simply has no support in the language of the

statute. For the language of the statute does not purport to confer upon the Government a right of judicial review, or a right of refusal to pay contractors pursuant to Disputes clause decisions favorable to contractors. This is because such a decision, if accepted by the contractor, disposes of the dispute by agreement of the parties within the contemplation of the standard "Disputes" clause.¹² Rather, the only factual situation to which the statute, on its face, addressed itself, in its context of overruling this Court's decision in *United States v. Wunderlich*, 342 U.S. 98, 96 L.Ed. 113 (1951), was its command to the Government that "no provision of any contract entered into by the United States . . . shall be pleaded . . . as *limiting judicial review* . . . to cases where fraud . . . is alleged . . ." in a suit by a contractor on such a contract. (Emphasis added.)

Conversely, the contractor can never be in a position where, in a suit brought by him—which is all we are talking about—he could plead the disputes clause, and an implementing Board decision, as "limiting judicial review" to cases where fraud is alleged. Indeed, his objective is the very reverse. His objective, in a suit brought in the Court of Claims, under the Wunderlich Act, must necessarily be, not to "limit" judicial review, but to seek the fullest possible judicial review:

Stated otherwise, the only situation to which the statute is addressed, in its express purpose of delimiting the finality of disputes clause decisions, is the

¹² In the present case, the agency decision favorable to Petitioner required implementation by the contracting officer "to proceed to final settlement or decision." See text at note 7 *supra et seq.* As there shown due to the intervention of the GAO such implementation did not take place.

situation where the contractor—and not the Government—seeks judicial review. Hence, it does not reach the point of purporting to confer a right of judicial review on the Government.

2. The Interpretation of the Wunderlich Act by the Court Below Is Anomalous Since It Accords Greater Contractual Finality to Decisions of Subordinate Contracting Officers Favorable to Contractors Than It Does to the Same Decisions Rendered at the Agency Head Level:

The standard "Disputes" clause as incorporated in Petitioner's contract¹⁸ provides that, unless the contractor appeals from a decision of the contracting officer to the agency head within the time provided, that decision is final and conclusive as to questions of fact. The Wunderlich Act by its terms affords no basis for judicial review of contracting officers' decisions, in the absence of such an appeal first having been taken.

When the contracting officer and the contractor dispose of a dispute by agreement, there is ordinarily no occasion for the issuance of a decision by the contracting officer. Rather, the agreement resolving the dispute, if time or money are involved, is usually the subject of a contract modification executed by the parties. To such agreements (whether evidenced by a contracting officer's decision or by a supplemental agreement), the Wunderlich Act by its terms has no application. As pointed out in Judge Collins' dissent quoted above, the anomaly, created by the court below, becomes evident when the Wunderlich Act is read as enabling the Government to obtain judicial review of decisions at the agency head level favorable to

¹⁸ See pp. 4, 5, *supra*.

contractors when, plainly, that course is not open to the Government when the contractor obtains the same favorable result at the subordinate contracting officer level. Stated otherwise, since a "Disputes" clause decision on a question of fact favorable to a contractor at the contracting officer level is contractually binding on the Government and the contractor, unless the contractor appeals to the agency head, it is nonsense to read the Wunderlich Act as denying any less contractual finality to the same decision rendered at the agency head level which is acceptable to the contractor. Moreover, as earlier indicated, such a decision rendered at the agency head level, when accepted by the contractor, disposes of the dispute by agreement of the parties within the contemplation of the standard "Disputes" clause.

3. To Refuse Payments Ordered as an Outcome of Appeal Proceedings Under the Disputes Clause Constitutes a Breach of Contract, Inasmuch as the Government Is Given No Contractual Right Under the Disputes Clause to Judicial Review of Decisions Favorable to the Contractor:

The entire procedure under the standard "Disputes" clause is contractual in nature, and the Wunderlich Act does not alter this fact since it was not a jurisdictional statute. ~~It did not confer any additional authority on the heads of agencies, and it did not revise the basic jurisdiction of the federal courts.~~

Thus we necessarily fall back on the "Disputes" clause. And the "Disputes" clause in Government contracts represents a substantial departure from the traditional methods of resolving controversies between private parties, inasmuch as determinations under the clause are made by a representative of only one of the contracting parties—the Government. There is a noteworthy possibility of conflict of interest on the

part of such Government representative, which is inherent under the clause. This, however, has been justified, historically, not on any basis of sovereignty or public policy, but on the basis that the contractor has *consented* in the contract to the determination of disputes by the person designated in the clause. See *Kihlberg v. United States*, 97 U.S. 398, 24 L.Ed. 1106 (1878), and *United States v. Adams*, 74 U.S. (7 Wall) 463, 19 L.Ed. 249 (1868). The history of the clause also makes it absolutely clear that the only exceptions to the conclusiveness of the decision by the person designated in the clause—*e.g.*, a decision that was fraudulent, arbitrary, or capricious—were first expressed by the courts as an implied condition of the contractor's consent. This implied condition was deemed necessary to justify enforcement of a provision permitting a representative of one of the contracting parties to make the decision, and unquestionably was only for the contractor's protection.

In the clause in this case, the contractor consented to the determination of disputes by the contracting officer, and the *Commission* on appeal. Hence, the "Government's" disavowal of the decision made by its representative named in the contract to make such decision, is a breach of its contractual obligation. We submit that the contractor's consent to permit a specific representative of the Government to decide disputes—the Commission—should not be read as permitting any different representative of the Government to "veto" decisions rendered by the Commission which are in favor of the contractor in the absence of allegations of fraud, bad faith or illegality on the part of the Commission—none of which is alleged below.

In addition, the "Disputes" clause clearly contemplates that the contractor, not the Government, is to

be the moving party at each step in the procedures established by that clause. First, the contractor must present his claim to the contracting officer, and if the parties dispose of the dispute by agreement, that is the end of the matter. Under the "Disputes" clause there is no Government right of administrative appeal or right to judicial review of that agreement, or from any decision of the contracting officer not appealed by the contractor. However, if the contractor is aggrieved, he has the right to appeal to the head of the department, whose decision, or that of his authorized representative, is "*final and conclusive*," subject only to the possibility that the contractor may seek judicial review of an adverse decision. This possibility is recognized in the clause which confers finality upon the decision of the head of the department, for it specifies the circumstances in which a court may overturn the decision, thus contemplating that it will be only the contractor—the moving party throughout the procedure—who will seek such judicial review.

Accordingly, the "Disputes" clause does not provide for a right on the part of the Government to judicial review, and a refusal by the Government to carry out a decision on appeal under that clause which is acceptable to the contractor constitutes a breach of that contractual provision. Such breach would then entitle the contractor to recovery without regard to review under the Wunderlich Act standards, inasmuch as that Act does not apply to actions for breach of contract. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 16 L.Ed.2d 642 (1966).

As Judge Skelton stated in the portion of his dissent quoted at p. 8 *supra*, this procedure may appear—but at first blush only—to be one-sided and unfair.

More thoughtful study shows that it is not one-sided and unfair. First, the clause is prescribed by the Government and the contractor has to take it if he wants the contract. He has no choice on the matter. Second, the clause and its predecessors have been uniformly interpreted for over 45 years as conferring no right of judicial review on the Government. Third, the clause provides that the mechanics of review are to be invoked at the instigation of the contractor in each instance. Fourth, it is a designated representative of the Government—a party to the contract—who is the decision maker at each step. And fifth, as discussed below, the contractor is obligated by the contract to proceed with performance of the contract in accordance with the decision of the contracting officer.

The decision below has disregarded the breach of contract committed by the Government in this instance, and has thereby set at naught the entire contractual basis established for the resolution of disputes.

4. **The Quid Pro Quo for the Contractor's Disputes Clause Promise To Give Up His Right of Contract Rescission and To Bear the Burden of Financing the Work in Accordance With the Contracting Officer's Decision. Is the Government's Disputes Clause Promise To Provide Speedy, Fair and Final Administrative Settlement and Payment Procedures, Subject to the Contractor's Right to Judicial Review:**

When the contracting officer and the contractor are unable to settle a dispute by agreement and the contractor appeals the contracting officer's decision to the agency head, the contractor further agrees, "pending final decision of a dispute hereunder," to "proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

It is obvious that the duty so to proceed may impose a very substantial financial burden on contractors as when, for example, the controversy centers on whether the work is required by the contract specifications or should be paid for as extra work. It is equally apparent that the public interest in the accomplishment of Government procurement has long required that contractors be asked to relinquish most of their rights to contract rescission and suit in court for damages by agreeing to proceed with the work, notwithstanding the dispute, and to proceed in accordance with the contracting officer's decision.¹⁴

The *quid pro quo* to contractors for this relinquishment of the right of contract rescission and suit in court for damages and for bearing the burden of financing the costs of disputed work pending the administrative appeal has been the Government's promise to provide expeditious and fair procedures for the administrative appeal and final settlement of the dispute and payment thereon.¹⁵ As stated by this Court,

“... Pre-eminently, this policy [of utilization of the administrative procedures contractually

¹⁴ The standard “Disputes” clause has so provided since 1926. See Petrowitz, *Methods of Resolving Contract Controversies Pertaining to Government Contracts and Subcontracts: An Empirical and Analytical Study*, Senate Document No. 99, 89th Cong., 2d Sess. (1966) at 17.

¹⁵ We have seen that the purpose of the Wunderlich Act was to enable contractors, notwithstanding the “Disputes” clause language, to obtain judicial review of agency decisions adverse to them.

The mutual understanding, implicit in the “Disputes” clause, that the contractor would proceed with the performance and financing of work that was the subject of dispute, in return for a prompt determination and payment (where appropriate) of its

bargained for] is grounded on a respect for the parties' rights to contract and to provide for their own remedies. See *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 16 L.Ed. 2d 642, 86 S. Ct. 1545; *United States v. Moorman*, *supra*, 338 U.S. at 461-462, 94 L.Ed. at 259, 260. But, beyond that, there is also a belief that resort to administrative procedures is an expeditious way to settle disputes, conducive of speed and economy. *United States v. Blair*, *supra*, 321 U.S. at 735, 88 L.Ed. at 1043. Such procedures also facilitate a department's supervisory control over contracting officers and perhaps enhance the possibility of harmonious agreement. *Ibid.*" *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429, 16 L.Ed. 2d 662, 667 (1966). (footnote omitted.)

In addition, the decision of this Court in *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 10 L.Ed. 2d 652 (1963), has largely eliminated, in the light of its interpretation of the Wunderlich Act, the contractor's previously understood opportunity, under the Tucker Act, to obtain a judicial trial in the Court of Claims of the factual issues decided adversely to him at the agency head level, thus substantially enlarging the finality of decisions under the standard "Disputes" clause favorable to the Government and correspondingly diminishing the rights of the contrac-

claims, was also expressed by representatives of the contracting agencies and industry in the congressional hearings that led to the passage of the Wunderlich Act. Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st and 2nd Sess., 1953-1954, on Review of Finality Clauses in Government Contracts, pp. 4, 8, 13, 52, 92-93, 108, 116, 123, 132; Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 82d Cong., 2d Sess., 1952, on Finality Clauses in Government Contracts, pp. 39-40, 78-79, 91-92.

tor. One commentator, pointing out how the judicial remedies of Government contractors have thereby suffered, has written:

"... The [C]ourt of Claims is powerless to reverse an agency decision even though it may be based on clearly erroneous conclusions of fact, because of the 'substantial evidence' test. This is the clearest example of how sovereign immunity has, in effect, been reimposed in a substantive sense

"In summary, the court review is more expensive and time consuming than a regular trial on the merits, and at the same time it is handicapped in its efforts to administer justice."

* * *

"In summary, since *Bianchi*, the commitment to the disputes procedure of previously accepted rights has not been an unrelieved blessing. If there is an adverse decision by the agency (and two-thirds of the cases brought to the ASBCA, for example, fall in that category), the findings of fact are entitled to finality, and no further trial of the case is permissible. And if a claimant prevails he is entitled to only the limited agency relief prescribed by the particular clause (or anti-claims clause) on which the claims rest. Is this not a partial reimposition of sovereign immunity . . . ?" ¹⁶

Obviously, then, if the dispute cannot be settled by agreement with finality at the agency head level and

¹⁶ Spector, *Contract Disputes and Remedies: Are Current Practices for Redress of a Contract Grievance Against the Government Fair and Efficient?*, 5 National Contract Management Journal 7, 10 (1971). The author is a Commissioner of the United States Court of Claims, and former Chairman of the Armed Services Board of Contract Appeals.

payment made by the Government thereon, the efficacy of the whole system of administrative adjudication and settlement of contract disputes is thrown into doubt, and perhaps into chaos as suggested by Judge Collins in his dissenting opinion below.¹⁷

5. The Request of the Attorney General to the Contracting Agencies To Screen Decisions at the Agency Head Level Favorable to Contractors for Conformity to the Criteria of the Wunderlich Act Coupled With the Decision of the Court Below, Pose Grave Risks to Contractors in Relying on the Finality of Disputes Clause Settlements and Payments Thereon:

On January 16, 1969, the Attorney General, in the course of an opinion to the Secretary of the Air Force, 42 *Ops. Att'y Gen.* No. 33, as to the effect to be given a decision of the General Accounting Office overruling a decision of the Armed Services Board of Contract Appeals favorable to the Government, stated that:

"The contracting agencies should call to this Department's attention, on a continuing basis, appeals board decisions against the Government which they feel warrant litigation in accordance with the Wunderlich Act." *Id.* at 19.

¹⁷ See Parties' Joint Appendix, p. 97. That the Department of Defense views decisions of its Armed Services Board of Contract Appeals favorable to contractors as binding settlements under the "Disputes" clause is shown by the fact that since 1966 its regulations have provided that "Decisions of the Armed Services Board of Contract Appeals constitute decisions of the head of the department as referenced in the disputes clause standard in all Government contracts. It is expected that decisions favorable to the appellant in whole or part will be promptly implemented by payment at the contracting officer level" ASPR 1-314(g), 32 C.F.R. § 1.314(g) (1970). See Hearings on H.R. 474, *To Establish a Commission on Government Procurement*, 91st Cong., 1st Sess. 1813 (1969).

The Attorney General's opinion continued:

"If an agency has policies or procedures which inhibit its officials from performing this function, it should reconsider them. A contracting agency may also wish to consider whether it should adopt affirmative procedures to facilitate the screening of board decisions." *Id.* at 21.

Finally, the Attorney General stated that:

"Delay in payment to a contractor who has been successful before a board need not be occasioned by the procedures I have suggested. Payment in accordance with board decision might still be made, as it has in the past, subject to recovery by the Government if the decision is later determined by the courts not to satisfy Wunderlich Act standards." *Id.* at 21, 22.

From this it would appear that there will be substantial efforts zealously undertaken within the Government contracting agencies to persuade the Department of Justice (or the General Accounting Office) that disputes clause decisions at the agency head level favorable to contractors should be overturned or challenged on Wunderlich Act grounds. This invitation for subordinates of the agency head so to refer matters to the Department of Justice for appropriate action does not appear to be deterred by the fact that in the Department of Defense, as was done in Petitioner's case, decisions of the Armed Services Board of Contract Appeals are made "as fully and finally as might each Secretary" make them. 32 C.F.R. § 30.1 (1970).¹⁸ The decision below, if not reversed by this Court, will give added impetus to efforts by agency employees to overturn the decisions rendered at the level of their agency heads with which they disagree and to prevent

¹⁸ In Petitioner's case the entitlement decisions favorable to Petitioner were made by the Commissioners of the Atomic Energy Commission.

payment on them. This is likely to breed a pernicious informer system, to open the door to disgruntled Government officials and duress and coercion of contractors in claims settlements, and perhaps to invite chaos in the Government contract field. Further, the decision below (viewed in the light of the Attorney General's opinion quoted above) would inject the Department of Justice directly into the administrative resolution of contract disputes where it is not contractually empowered to act. This would be a result which also has no statutory or contractual authorization, and which, by ex parte, anonymous second-guessing of decisions at the agency head level, would contravene the procedural fairness requirements of the "Disputes" clause. Obviously, unless corrected by this Court, all this poses grave risks to contractors (and posed a fatal one to Petitioner) in relying on the finality of "Disputes" clause settlements and payments thereon.

6. The Wunderlich Act and Its History Disclose No Congressional Purpose To Authorize Anyone To Overturn Disputes Clause Decisions at the Agency Head Level Favorable to Contractors:

Prior to the enactment of the Wunderlich Act of 1954, the rare efforts by the Government, at the instance of the General Accounting Office or otherwise, to overturn agency decisions favorable to contractors under the standard disputes clause met with virtually no success in the courts.¹⁹ And so far as the General Accounting Office is concerned, the legislative history of the Wunderlich Act clearly indicates that the Congressional purpose was not to change the jurisdiction of the General Accounting Office in any way, but to

¹⁹ See the cases cited in Judge Collins' dissenting opinion below, Parties' Joint Appendix, pp. 90, 91 and at footnote 5 thereto.

leave it free to exercise its own statutory authority, as the same existed prior to the *Wunderlich* decision.²⁰

Although the precise parameters of this authority, existing in the General Accounting Office before the Wunderlich Act, are nowhere spelled out in definitive form, the legislative history of that Act indicates a widely held understanding that the General Accounting Office's role was restricted to a review of the legal propriety of payments to determine whether there had been fraud or overreaching, and that the General Accounting Office had no authority to reverse decisions of the contracting officer or the heads of Departments under the "Disputes" clause.²¹

²⁰ H. Rep. 1380, 83d Cong., 2d Sess. at 6-7 (1954):

"The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.

"The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office. It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill. At the same time there is no intention of setting up the General Accounting Office as a Court of Claims. . . ."

²¹ Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st and 2d Sess., 1953-1954 on Review of Finality Clauses in Government Contracts, pp. 94, 109-111, 118, 132, 138-139.

As stated by the Attorney General in his opinion dated January 16, 1969, 42 Ops. Att'y Gen. No. 33:

"Precisely what that independent authority [of the General Accounting Office] was or should be was a controversial ques-

Moreover, nothing in the history of the enactment of the Wunderlich legislation discloses any Congressional purpose of authorizing the Government procurement agencies or the Department of Justice to repudiate decisions favorable to contractors at the agency head level on grounds that they might not conform to the criteria laid down by that Act for judicial review available to contractors aggrieved by agency decisions favorable to the Government. Instead, the legislative history of the Wunderlich Act shows that representatives of both Government and industry informed Congress that in order for contractors to obtain bonds and financing for the performance of disputed work, and to insure the bankability of their contracts, it was essential that administrative finality attach to decisions and settlements under the "Disputes" clause favorable to contractors.²² Clearly, that legislative history shows no Congressional intent to establish a system requiring procurement personnel within the agencies to second-guess decisions made at the agency

tion, as to which Congress deliberately avoided making any decision in the Wunderlich Act. While the legislative history contains some conflicting statements, on balance it does indicate that that Congress did not intend to set GAO up as an additional layer of administrative appeal for contractors on disputes questions. The House Report on the bill eventually enacted states that 'there is no intention of setting up the General Accounting Office as a "court of claims."'" *Id* at 12, 13. (Footnotes omitted.)

See also Judge Collins' dissent, Parties' Joint Appendix, p. 90, footnote 3. The relevant statutes pertaining to the General Accounting Office and to the Department of Justice are set forth in Appendix A, *post*.

²² Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st and 2d Sess., 1953-1954, On Review of Finality Clauses in Government Contracts, pp. 54-55, 92-93, 116; Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 82d Cong., 2d Sess., 1952, on Finality Clauses in Government Contracts, p. 121.

head level with its resultant adverse impact on the financing of Government contracts, and on the willingness of contractors to continue to proceed with the contract work, and finance it, in accordance with the decision of the contracting officer, pending the administrative appeal. With respect to the Department of Justice, it is apparent from the legislative history, that this Department (the only agency that consistently opposed the enactment of any remedial legislation) was to have no role whatever in the "Disputes" clause process, other than to act as the Government's attorney after a contractor filed suit in the courts.

On the contrary, as set forth in Point 1 hereof, the Wunderlich Act, by its very terms, only addressed itself to the situation where the contractor brings judicial review. This, in turn, is the setting of its legislative history.

7. Reversal of the Decision Below Will Not Diminish or Impair the Government's Power To Recover Illegal Contract Payments:

We do not suggest that actions under the "Disputes" clause favorable to contractors necessarily override the power of the Government to recover public funds illegally paid. Nor do we intimate that, in appropriate circumstances, responsibility for initiating such recovery may not properly fall to the General Accounting Office, the contracting agency, or to the Department of Justice. What we do question, however, is the blanket assertion of this power either by the Attorney General or the Comptroller General without regard to the lawful exercise of the functions committed by statute and by contract to the contracting

officer and to the agency head and his delegate in the resolution and settlement of contract disputes.

Our position is that any settlement of a contract dispute made by the parties under the standard "Disputes" clause, whether or not the result of a decision made at the level of the agency head or his representative (e.g., the Armed Services Board of Contract Appeals), is binding and conclusive on the parties, and not subject to judicial scrutiny, under the Wunderlich Act or otherwise, in the absence of allegations by either party that such a settlement is the result of fraud or bad faith or is beyond the authority of the Government contracting agency to make. *United States v. Corliss Steam Engine Co.*, 91 U.S. 321, 23 L.Ed. 397 (1875); *Cannon Construction Company, et al. v. United States*, 162 Ct. Cl. 94, 319 F. 2d 173 (1963); *Brock & Blevins Company, Inc. v. United States*, 170 Ct. Cl. 52, 343 F. 2d 951 (1965). Cf. *United States v. Mason & Hanger Co.*, 260 U.S. 323, 67 L.Ed. 286 (1922). To allege, as have the Comptroller General and the Attorney General, respectively, but independently of each other, that the decision of the Atomic Energy Commission under the standard "Disputes" clause favorable to Petitioner in this case is not supported by substantial evidence and is also erroneous on questions of law, falls considerably short of alleging action by the Atomic Energy Commission beyond its authority with regard to the settlement of contract disputes so as to warrant judicial examination of the matters complained of. For the authority of the Atomic Energy Commission to contract, like that of other agencies of the Government, necessarily includes the power to make settlements of contract disputes

that bind the Government. *United States v. Corliss Steam Engine Co., supra*; *United States v. Mason & Hanger Co., supra*.

The Wunderlich Act, as we have shown, does not limit this power to make binding settlements under the standard "Disputes" clause since by its terms it applies only to *decisions* on disputed questions of fact and law that do not ripen into settlements made by the parties because they are unacceptable to the contractor. Such is not the case here as Petitioner has at all times been willing to negotiate with the Contracting Officer of the Atomic Energy Commission to carry out the entitlement decisions of the Atomic Energy Commission favorable to Petitioner. Such negotiations having been frustrated by the actions of the Comptroller General and the Attorney General in breach of Petitioner's contract, Petitioner is thus entitled to reversal of the decision below.

CONCLUSION

In contractual effect the decision of the Atomic Energy Commission favorable to Petitioner's claims of entitlement under the contract "Disputes" clause amounted to a settlement or agreement that this Court should hold is final and binding on the Government, in the absence of fraud, bad faith or illegality on the part of the Atomic Energy Commission in making that settlement or agreement—none of which is alleged below. So viewed, this controversy has no place in the courts on judicial review under the criteria of the Wunderlich Act.

For all the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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APPENDIX A

1. Section 305 of the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U.S.C. § 71 (1964):

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

2. The same; Section 304 of the Budget and Accounting Act of 1921, 42 Stat. 24, as amended, 31 U.S.C. § 74 (1964):

"Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller General of the United States, may, within a year, obtain a revision of the said account by the Comptroller General of the United States, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government. Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement.

"The General Accounting Office shall preserve all accounts which have been finally adjusted, together with all vouchers, certificates, and related papers, until disposed of as provided by law.

"Disbursing officers, or the head of any executive department, or other establishment not under any of

the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement."

3. Liability of Certifying Officers: Section 3 of the Act of Dec. 29, 1941, 31 U.S.C. § 82d (1964):

"The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification."

4. 28 U.S.C. § 516 (1964): *Conduct of litigation reserved to Department of Justice:*

"Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

5. 28 U.S.C. § 519 (1964): *Supervision of litigation:*

"Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties."

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-88

S & E CONTRACTORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF CLAIMS**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (App. 45-97) is reported at 433 F. 2d 1373.

JURISDICTION

The decision of the Court of Claims was entered on November 30, 1970. The petition for a writ of certiorari was filed on February 26, 1971, and was granted on May 17, 1971, 402 U.S. 971. The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in a suit against the United States in the Court of Claims to recover the amount a contracting

agency found to be due to a government contractor in a proceeding under the standard disputes clause of the contract, the United States may challenge the decision of the agency under the standards embodied in the Wunderlich Act (41 U.S.C. 321-322).

STATUTES INVOLVED

The Wunderlich Act provides:

41 U.S.C. 321:

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is so fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

41 U.S.C. 322:

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

STATEMENT

Petitioner initiated this action in the Court of Claims against the United States to recover the amount which it claimed was due under a determination by the Atomic Energy Commission pursuant to

the disputes clause in a government contract. The Court of Claims held that the government was entitled to defend the suit by challenging the Commission's decision under the standards contained in the Wunderlich Act, 41 U.S.C. 321-322, and remanded the case to the court's commissioner for a consideration of the government's defenses on the merits (App. 45-61). That remand has been held in abeyance pending this Court's review of the decision of the Court of Claims.

The contract in question was entered into between petitioner and the United States, represented by the contracting officer, in August 1961 for the construction of a testing facility in Idaho (1R. 62). The contract disputes clause, standard in all government contracts entered into at that time,¹ provided:

6. *Disputes*

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or

¹ In 1964, the clause was amended in minor respects. See Pet. Br. 50-51, n. 8.

capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law [1R. 68].

While performing the contract, petitioner requested a number of extensions of time and equitable adjustments in its terms. Pursuant to the disputes clause, these claims were submitted to the Commission's contracting officer for the project, who rendered decisions on August 8 and November 8, 1962, denying a number of the claims and approving others (App. 1, 6). Petitioner appealed the adverse rulings to the Commission, which, pursuant to its then applicable regulations, referred the appeal to a Commission hearing examiner.

After a 13 day hearing, the examiner issued his opinion in June 1963 sustaining eight of petitioner's

* See 10 C.F.R. (January 1, 1963) 2.1 *et seq.* As the regulations made clear, the *de novo* proceedings before the hearing examiner were adversary, with the contracting officer empowered to present evidence and argument in support of his rulings.

claims and remanding them to the contracting officer for negotiation of a final settlement (*ibid.*). As authorized by the Commission's regulations, the contracting officer filed a petition for review of the examiner's decision with the Commission, and on November 14, 1963, the Commission granted the petition with respect to four issues (*ibid.*)—an action which had the effect of affirming the hearing examiner's decision in favor of petitioner on the other issues.³ On May 13, 1964, the Commission issued a decision on those four issues, sustaining in part the hearing examiner. The proceedings were remanded to the contracting officer for settlement in accordance with the decisions of the Commission and the hearing examiner (App. 2).⁴

On March 6, 1964, before the Commission's final decision, a certifying officer⁵ of the Commission re-

³ 10 C.F.R. (January 1, 1963) 2.760 provided that the hearing examiner's decision became the final decision of the Commission unless a party filed a petition for review within 20 days. If the petition for review were granted in whole or in part by the Commission, which it could do in its discretion (Section 2.762(d)), it could adopt, modify, or set aside the hearing examiner's decision and issue its own decision (Section 2.770). If the petition for review were denied, the hearing examiner's decision became the final action of the Commission (Section 2.762(e)).

⁴ The Commission itself no longer considers contract disputes appeals, since in 1964 a Commission Board of Contract Appeals was established to rule on such appeals. See 10 C.F.R. (Jan. 1, 1966 Cum. Supp.) 3.1, *et seq.*

⁵ Certifying officers are charged with the responsibility of certifying that vouchers submitted by contractors and other claimants are correct for payment. For a discussion of the historical and current responsibilities and liabilities of certifying and disbursing officers, see Cibinic and Lasken, *The Comptroller General and Government Contracts*, 38 G.W.L. Rev. 349, 358-362 (1970).

requested an opinion from the General Accounting Office ("GAO") with respect to several items ordered to be paid by the hearing examiner and not then under review by the Commission. In December 1966, the Comptroller General issued an opinion which reviewed in full the merits of the Commission's decisions granting petitioner's claims and found the decisions deficient under the standards of the Wunderlich Act. Accordingly, the Commission was advised not to pay the disputed claims.⁶ 46 Comp. Gen. 441, 544. On March 27, 1967, the Commission, through its general manager, advised petitioner that petitioner had exhausted its administrative remedies and that the Commission would take no action on petitioner's claims inconsistent with the views expressed in the Comptroller General's opinion (App. 10).

Shortly after the notification from the Commission, petitioner commenced this action in the Court of Claims seeking the amount awarded in the Commission's 1964 decisions upholding its claims (App. 4-9). In its answer, the United States asserted as a defense that the administrative decisions were not final under the Wunderlich Act because they were not supported by substantial evidence and were erroneous as a matter of law (App. 14-16). On cross motions for summary judgment, a commissioner of the Court of Claims ruled in favor of petitioner, but without

⁶ A chronology and description of the various consultations among GAO, petitioner and the contracting officer during the course of GAO's review of petitioner's claims is contained in the appendix to this brief ("GAO App.") setting forth the views of GAO on its authority to review agency contract disputes decisions. See GAO App., *infra*, pp. 42-44.

reaching the merits of the government's Wunderlich Act defense (App. 18-44). Focusing on the intervention of GAO, the commissioner concluded that GAO lacked the authority to review under the standards of the Wunderlich Act the Commission's decisions upholding petitioner's claims (App. 35-42). In his view, the Commission was not justified in acquiescing in GAO's opinion and, accordingly, the Commission's failure to implement its decisions favorable to petitioner was a breach of the disputes clause in petitioner's contract (App. 43).

The Court of Claims rejected the commissioner's ruling, holding—after a review of the legislative history of the Wunderlich Act (App. 49-55)—that the government was entitled under the statute to the same judicial review of the administrative determinations as were contractors. The court found the question whether GAO had authority to “review” administrative disputes decisions to be irrelevant; under the Wunderlich Act, it ruled, the only question before it was “how much finality attaches to the findings and holdings” of the Commission (App. 49). Furthermore, an agency's refusal to pay an award was considered to be of no consequence as the refusal “is not a breach of the disputes clause if the involved award is not supported by substantial evidence or otherwise is not entitled to finality under the Wunderlich Act” (*ibid.*); The court remanded the case to the commissioner for a consideration of the government's Wunderlich Act defenses (App. 61).

Three judges dissented (App. 61, 83). Two of them concluded that once the Commission had upheld peti-

tioner's claims, the controversy was extinguished and could not be revived either by an independent review by GAO or by the assertion of Wunderlich Act defenses by the Department of Justice in subsequent litigation (App. 61-82). The third dissenting judge followed the commissioner, arguing that the Commission violated the disputes clause of the contract by failing to implement its 1964 decisions (App. 97). The judge's own review of the legislative history of the Wunderlich Act led him to conclude that Congress did not intend GAO to exercise broad review of agency disputes decisions and, finally, that "the Wunderlich Act does not, and was never intended by Congress to, invest the federal agencies or their counsel with authority to challenge the decisions which the agencies themselves have made pursuant to a contractual provision" (App. 85-93, 97).

SUMMARY OF ARGUMENT

I

Prior to the enactment of the Wunderlich Act, 41 U.S.C. 321-322, decisions of contracting agencies were final and binding upon both parties in the absence of fraud. See *United States v. Moorman*, 338 U.S. 457; *United States v. Wunderlich*, 342 U.S. 98. While, under that state of the law, the disputes clause of government contracts provided an expeditious method of settling disputes—avoiding time-consuming and expensive resort to the courts—it did so to the point of giving finality to agency disputes decisions which were arbitrary or unsupported by substantial evidence. In passing the Wunderlich Act, supported by

government and industry spokesmen alike, Congress made the determination that whatever might be lost in expeditiously settling contract disputes was outweighed by the desirability of permitting judicial review to determine whether agency disputes decisions were "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." 41 U.S.C. 321.

Both the language and the legislative history of the Wunderlich Act indicate that the judicial review provided was to be equally available to the government and contractors alike. The statute provides that contract clauses limiting judicial review cannot be "pleaded in any suit"; no suggestion can be inferred that it is only the government that cannot plead such clauses. Numerous statements during all phases of the legislative history of the Act attested to the fact that agency disputes decisions frequently were adverse to the government and suggested that the rights of the government and contractors to review should be coextensive. Although a dispute did develop during the consideration of the proposed legislation over the role that the Government Accounting Office should play in the review of agency disputes decisions, that controversy did not overshadow the substantial support for a judicial review that would work both ways. The report of the House Judiciary Committee on the bill which was passed reflected that sentiment by noting that "everyone should have his day in court" and that "contracts should be mutually enforceable." H. Rep. No. 1380, 83d Cong., 2d Sess., p. 4. Finally, bills which would have expressly limited the availability of judi-

cial review to contractors were introduced, but not adopted by Congress.

II

If our interpretation of the Wunderlich Act is accepted, there remains the question whether the government, though the Department of Justice, is authorized to assert Wunderlich Act defenses in this case. Petitioner argues (Pet. Br. 37) that this question can only be resolved by determining whether GAO was acting within the scope of its authority in reviewing the Commission's decision on petitioner's contract claims. In our view, the plain language of the Wunderlich Act—prohibiting reliance on contract provisions to limit judicial review in "any suit" (41 U.S.C. 321)—makes it unnecessary to determine whether GAO's intervention was justified. Moreover, it was not GAO's intervention, but the decision of the Commission not to take further action on petitioner's claims, which precipitated petitioner's suit.

While it is our position that Wunderlich Act defenses can be asserted by the government in a suit brought by a contractor upon *any* refusal of a contracting agency to implement an agency disputes decision favorable to the contractor, we contend that, at least in this case, the withholding of action by the Commission was proper. In our view, once an agency has reason to believe that its decision may be vulnerable under the Wunderlich Act, it has the right—even though it might still believe its decision to be correct—to force judicial review of that decision. This right is an attribute of the government's right to judi-

cial review secured by the Wunderlich Act and thus cannot be denied by any provision in a government contract. But, as the disputes clause in petitioner's contract tracks the language of the Wunderlich Act, the Commission cannot be deemed to have violated the terms of its contract under any view.

Once a case is initiated in the Court of Claims by a contractor against the United States, the Department of Justice is directed by law to conduct the litigation on behalf of the government, 28 U.S.C. 516, 519, and this authority includes the responsibility for determining what defenses can and should be asserted to the contractor's claim. In the instant case, the Department and the Department alone had the final authority for determining whether Wunderlich Act defenses should be asserted in defending petitioner's suit. Only in this role as the government's attorney in court litigation, does the Department "review" the disputes decisions of contracting agencies.

III

Finally, we doubt that affirmance of the decision below will, as petitioner suggests, spell the end of the utility of the disputes process. In view of the number of challenges of agency disputes decisions by contractors, it is unlikely that the occasional assertion of the right to judicial review by the government will impose an undue burden on the Court of Claims or disrupt the normally expeditious resolution of disputes. Petitioner has pointed to no marked increase in litigation since the Court of Claims explicitly recognized some 6 years ago that the government has a

right to judicial review under the Wunderlich Act. See *C. J. Langenfelter & Son, Inc. v. United States*, 341 F. 2d 600.

ARGUMENT

I. THE LANGUAGE AND LEGISLATIVE HISTORY OF THE WUNDERLICH ACT MAKE CLEAR THAT THE GOVERNMENT AS WELL AS CONTRACTORS IS ENTITLED TO JUDICIAL REVIEW OF AGENCY DETERMINATIONS UNDER THE STANDARD DISPUTES CLAUSE OF GOVERNMENT CONTRACTS

The Wunderlich Act, 41 U.S.C. 321-322, was passed in response to this Court's decision in *United States v. Wunderlich*, 342 U.S. 98, holding that in the absence of fraud—defined as “conscious wrongdoing, an intention to cheat or be dishonest,” 342 U.S. at 100—administrative decisions under the standard disputes clause in government contracts were final and not subject to judicial review. In the wake of that decision, industry and government spokesmen alike protested that the limited review permitted by the Court was too narrow and that corrective legislation was needed. In tracing the history of the legislation that emerged as the Wunderlich Act, petitioner (Pet. Br. 23-37) has concentrated primarily on the dispute over the role that the General Accounting Office (“GAO”) should play in reviewing administrative contract decisions. In petitioner's view (see, e.g., Pet. Br. 37), the government's right to assert the Wunderlich Act standards as a defense to petitioner's suit in the Court of Claims turns on the propriety of GAO's action in this case. In our view, however, the government's position in this case turns on an analysis of whether the Wunderlich Act sanctions challenges in court of

agency decisions by the government, irrespective of the role that GAO might play in any given case outside of the courts.

We begin with the language of the Act, which states that no provision of any contract entered into by the United States relating to the finality of a decision by an agency involving questions arising under the contract

* * * shall be pleaded in *any* suit * * * as limiting judicial review of any such decision to cases where fraud * * * is alleged: *Provided however*, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence [emphasis supplied to word "any"; 41 U.S.C. 321].

Thus, no one may assert that the agency decision is final and conclusive and not susceptible to judicial review. Nothing in the wording of the Act suggests that its broad review provisions should be limited to decisions adverse to the contractor. See *C. J. Langenfelder & Son, Inc. v. United States*, 341 F. 2d 600, 607 (Ct. Cl.); *Acme Process Equipment Co. v. United States*, 347 F. 2d 538, 543 (Ct. Cl.); cf. *United States v. Utah Construction Co.*, 384 U.S. 394, 422.¹

¹ This Court there stated (384 U.S. at 422):

In the present case the [Atomic Energy Commission Contract Appeals] Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes were clearly relevant to issues properly before it, and *both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings* * * *. [Emphasis added].

The legislative history of the Act confirms that the broad provisions of the statute were intended to prevent either party to a government contract from relying on this disputes clause to cut off judicial review of agency decisions on contract disputes. At the Senate hearings held on S. 2487, one of the initial bills introduced in the 82d Congress to modify the *Wunderlich* decision, numerous witnesses pointed out that the government as well as a contractor could be adversely affected by agency decisions and that judicial review should be available to both parties. Frank L. Yates, Assistant Comptroller General, appeared to object to the omission of any reference to the General Accounting Office in the bill on the ground that the omission would preclude GAO from questioning the propriety or legality of payments made to a contractor as a result of an arbitrary or grossly erroneous decision of an agency. Hearings on S. 2487 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 2d Sess., p. 10. While Mr. Yates' specific concern was with the role of GAO in the disputes process, he noted in more general terms that the *Wunderlich* decision "works both ways," that administrative officials not infrequently make decisions adverse to the government and that the interests of the government are just as involved in the proposed legislation as the interests of contractors (*id.* at 9, 12). In his view, the "rights of contractors and the Government to review or appeal should be coextensive" (*id.* at 11). By letters to the chairmen of both the Senate and House Committees on the Judiciary, the Comptroller General also noted that deciding agency

officials can make arbitrary determinations in favor of contractors as readily as in favor of the government (*id.* at 6, 117).

Industry spokesmen as well testified at the Senate hearings that judicial review should be made available to government and contractors alike. The Associated General Contractors of America, representing more than 6,000 general contractors (*id.* at 22), went on record for the proposition that (*id.* at 29):

any decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based.

While at one point, the organization's general counsel, John C. Hayes, recommended legislation which would empower the Court of Claims to enter judgment against the United States on any claim on which a contractor shall seek review of an agency decision (*id.* at 30), he later made clear that the judicial review he was advocating should "cut both ways" for the benefit of both contractors and the government (*id.* at 31).^{*} Similarly, Gardiner Johnson, an attorney specializing in the representation of contractors, testified that both the government and the contractor should have the right to judicial review of agency decisions (*id.* at 83-84).

^{*} Mr. Hayes concluded his testimony by saying (*id.* at 32):

[W]e want to take the position of being absolutely fair in urging legislation that will protect the rights of both Government and contractor. That is all we want, a judicial review, that we think every citizen is entitled to.

Following the hearings, the Senate Judiciary Committee reported out a substantially amended bill, which specifically empowered GAO as well as the courts to review agency decisions. See S. Rep. 1670, 82d Cong., 2d Sess., p. 1. The committee report accompanying the bill noted the adverse impact that the *Wunderlich* decision had had on contractors and stated (*id.* at 2):

It must also be borne in mind that to the same extent this decision would operate to the disadvantage of an aggrieved contractor, it would also operate to the disadvantage of the Government in those cases, as sometimes happens, when the contracting officer makes a decision detrimental to the Government interest in the claim.

S. 2487 will have the effect of permitting review in the General Accounting Office or a court with respect to *any* decision of a contracting officer or a head of an agency which is found to be fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. * * *

The report also pointed out that the specific reference to GAO in the bill was

* * * not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office, either in the course of a settlement or upon audit; that the language in question is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but

simply to recognize the jurisdiction which the General Accounting Office already has [*id.* at 2-3].

While S. 2487, as amended, was passed by the Senate, no action was taken by the House before the 82d Congress adjourned; as a consequence, the amended bill was reintroduced in the Senate at the outset of the 83d Congress as S. 24^{*} and passed by the Senate. That the Senate viewed this legislation as providing for judicial review for both the government and contractors alike was further made clear by Senator McCarran, one of the bill's sponsors, who stated on the floor of the Senate on separate occasions during the consideration of the bill:

Senators who have looked into this matter know that the [*Wunderlich*] decision cuts two ways. It can hurt the Government badly, as well as doing an injustice to the contractors. In a recent case * * * [t]he contractor interposed a defense based upon the Supreme Court decision in the *Wunderlich* case * * *. The * * * result was a failure of recovery on behalf of the Government [99 Cong. Rec. 4573].

Obviously [*Wunderlich*] can operate greatly to the disadvantage of contractors, in cases where there has been a gross mistake against the interest of the contractor. It is equally true that, to the same extent, this interpretation can operate to the disadvantage of the Government in cases where there has been a gross mistake detrimental to the Government interest * * * [99 Cong. Rec. 6170].

* In reporting out S. 24, the Senate Judiciary Committee re-issued with only formal changes its earlier report on S. 2487 as S. Rep. No. 32, 83d Cong., 1st Sess.

Review of the subsequent history of S. 24 shows that the further amendments to the bill—specifically the deletion of the reference to GAO—were not intended to alter the general proposition of mutuality with respect to the judicial review provisions.

Following the Senate's passage of S. 24, the House conducted hearings on July 30, 1953, and January 21 and 22, 1954, on S. 24 (identical to H.R. 1839) and related bills. See Hearings on H.R. 1839, S. 24, H.R. 3634 and H.R. 6946 before Subcommittee No. 1 of the House Committee on the Judiciary, 83d Cong., 1st and 2d Sess. While a good deal of the testimony at these hearings focused on the consequences of referring to GAO in the legislation—although the opposition to the reference was not, as petitioner asserts (Pet. Br. 28), virtually unanimous (see *id.* at 5, 18, 33, 39)—several witnesses again stressed that the *Wunderlich* decision worked against the government as well as against contractors. Thus, at the first day of hearings in July 1953, the president of a contracting company urged passage of the proposed legislation to protect both the government and contractors (*id.* at 4), as did an attorney who represents government contractors (*id.* at 12). Another attorney, Alan Johnstone, commented that the bill—

* * *, substitutes for executive justice judicial justice * * *. [T]his bill would throw wide the portals of the courts of justice to anyone, including the Government, which has a grievance * * * [*id.* at 19].

Before resumption of the House Hearings in January 1954, the Comptroller General on December 30,

1953 wrote the Chairman of the House Judiciary Committee to propose certain amendments to S. 24 (*id.* at 135-137). The letter noted that there was considerable opposition to the reference to GAO in the proposed legislation and noted further that a rider to a Defense Department appropriation act providing for an appeal by a contractor to the Court of Claims from disputes decisions was inadequate, *inter alia*, because it "does not protect the Government where the administrative decision may be prejudicial to the interests of the Government" (*id.* at 135-136). To meet the opposition while at the same time protecting the right of the government to judicial review, the Comptroller General proposed an amendment to S. 24 which deleted any reference to GAO (*id.* at 136). With minor changes, this proposal eventually emerged as the Wunderlich Act. With respect to the future role of GAO in contract disputes, the letter concluded that the proposed amended legislation "will accomplish what we have been striving for all along and will place the General Accounting Office in precisely the same situation it was in before the decisions in the *Wunderlich* and [*United States v. Moorman*, 338 U.S. 457] cases" (*ibid.*).

With the resumption of the hearings, GAO's general counsel testified that both the Comptroller General's proposed amended bill as well as the earlier version of S. 24 would ensure review of decisions of administrative officials by GAO and the courts under the specified standards (*id.* at 38-39). He also stressed that agency decisions can work against the government and the taxpayer and that the rights of con-

tractors and the government to review or appeal should be coextensive (*id.* at 39.) Similar views on the need to protect the interests of the government were expressed by an associate general counsel of the General Services Administration and by Congressman Edwin E. Willis of Louisiana, both appearing as witnesses before the subcommittee (*id.* at 33, 57-59). Mr. Willis, when asked who in the government might decide to seek review, referred to the Department of Justice and the Department of Defense, as well as GAO (*id.* at 59). Finally, as at the Senate Hearings (see p. 15, *supra*), the Associated General Contractors of America went on record as supporting legislation that would grant both the government and contractors the right of judicial review of disputes decisions (*id.* at 63-64, 72, 75).

As petitioner has pointed out (Pet. Br. 28-33), a number of witnesses at the House Hearings representing either the Defense Department or private concerns urged that GAO should not be permitted to review administrative disputes decisions (see *id.* at 54-55, 92-93, 97, 103, 105-106, 116, 132). While some of the testimony of these witnesses did indeed focus on the effect that potential GAO intervention would have on the finality of administrative disputes decisions or the ability of contractors to secure financing on their contracts, some of the witnesses appeared to want no more than to confine review of such decisions to the courts. Leonard Niederlehner, Deputy General Counsel of the Defense Department, testified, for example, that if legislation were passed to limit the finality of agency disputes decisions, it should limit

review to courts of competent jurisdiction (*id.* at 55). That the amended bill omitting any reference to GAO which essentially became the Wunderlich Act did not by its terms foreclose the government from judicial review of agency disputes decisions, was expressly acknowledged by Franklin Schultz, an attorney opposed to giving the government any right to judicial review. During the course of his testimony, the following colloquy took place (*id.* at 110):

[Mr. SCHULTZ.] As I read the language of the Comptroller General's bill it does not say specifically that an appeal can be taken by an aggrieved contractor. It says that

no provision of any contract entered into by the United States relating to the finality or conclusiveness of any decision of the head of any department or his duly authorized representative or board in a dispute involving a question arising under such contract shall be pleaded—

it does not say by whom—

as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged.

And it says:

Provided, however, That any such decision shall be final and conclusive—

but it does not say against whom—

unless the same is found to be fraudulent * * *

Mr. HYDE. Does that not necessarily include both parties?

Mr. SCHULTZ. Yes, and that is exactly my point. * * *

Mr. Schultz' concern was that, unless the legislative history of the bill were clear to the contrary, the bill would permit GAO to argue that it had the authority to upset agency decisions (*ibid.*). His testimony did not refer to the fact that the agency itself or the Department of Justice might be involved in the government's decision to force judicial review.

Following conclusion of the hearings, the House Judiciary Committee reported out and recommended passage of the amended S. 24. The following passage from the accompanying report leaves little doubt that the review sanctioned by the Act was to be available to both the government and contractors (H. Rep. No. 1380, 83d Cong., 2d Sess., p. 4):

After extensive hearings it has been concluded that it is neither to the interests of the Government nor to the interests of any of the industry groups that are engaged in the performance of Government contracts to repose in Government officials such unbridled power of finally determining either disputed questions of law or disputed questions of fact arising under Government contracts, nor is the situation presently created by the Wunderlich decision consonant with tradition that everyone should have his day in court and that contracts should be mutually enforceable.

The amended bill was passed in the House and the Senate and was signed into law on May 11, 1954. 100 Cong. Rec. 5510, 5717, 6326.¹⁰

¹⁰ Some of the proposed bills before Congress to overcome the *Wunderlich* decision would have specifically limited the right to seek judicial review of agency decisions to contractors. H.R. 6301, for example, introduced in the 82d Congress, Sec-

In sum, we submit that the legislative history of the Wunderlich Act shows that Congress was repeatedly made aware of the adverse impact that agency disputes decisions could have on the government and the need to protect the government's interests as well as the interests of contractors. While a substantial dispute did develop over the role that GAO should play in the disputes process and while there are conflicting statements in the legislative history on the effect that the omission of any reference to GAO has on the authority of that entity,¹¹ the right of the government to review of agency disputes decisions *in the courts* was recognized by the statute and does not depend on the resolution of the conflict over GAO's authority.

ond Session, provided for judicial review only in those instances "in which the contractor shall seek to set aside a decision on a disputed question between the United States and such contractor, made by an officer, board, or other representative of the United States * * * " (pp. 1-2). The American Bar Association proposed legislation which limited the right of judicial review to the contractor (House Hearings, p. 91). Similarly, representatives of a number of private contractors proposed legislation which would preclude the United States from asserting as a defense in court the finality of the administrative decision, but would not prevent the contractor from urging finality (Senate Hearings, pp. 107, 108). Finally, the Shipbuilders Council of America proposed legislation which would bar inclusion of a clause in any contract which would limit the contractor's right to judicial review of any questions arising under the contract (Senate Hearings, p. 132). That none of these proposals was adopted or incorporated into the bill which was passed further supports the conclusion that the Wunderlich Act permits the government to seek judicial review of agency disputes decisions.

¹¹ For the views of GAO on its authority, see GAO App., *infra*, pp. 41-50.

II. THE GOVERNMENT, THROUGH THE DEPARTMENT OF JUSTICE, IS AUTHORIZED TO ASSERT WUNDERLICH ACT DEFENSES IN THIS CASE

As we have argued in Part I, the Wunderlich Act forecloses petitioner's reliance on the disputes clause of its contract to bar review by the Court of Claims of the Atomic Energy Commission's decision on petitioner's contract claims. Petitioner, however, asserts—in addition to its claim that the statute gives the government no right to judicial review—that GAO had no authority to intervene in the administrative disputes process, that the Commission's decision not to take action leading to the payment of petitioner's claim thus violated the terms of the contract, and that the Department of Justice had no authority to raise the Wunderlich Act defenses in this litigation. In our view, none of these assertions bars the government's right to judicial review of agency decisions secured by the Act.

A. THE COURT NEED NOT DECIDE WHETHER GAO'S INTERVENTION IN THIS CASE WAS PROPER

A major portion of petitioner's brief is devoted to the argument that GAO has no authority under either the Wunderlich Act or any other statute to intervene in the administrative disputes process (Pet. Br. 21-49) and that, even if it did, the disputes clause in petitioner's contract foreclosed exercise of that authority in this case (Pet. Br. 53-56). In petitioner's view, that issue must be resolved as GAO's intervention precipitated this suit and only if such intervention were "within the contemplation of the

Wunderlich Act could the Court of Claims have concluded, as it did, that the failure to pay petitioner was not a breach of contract" (Pet. Br. 37). We believe this view is unsound for two reasons.

First, and most fundamentally, the factors that precipitated petitioner's suit in the Court of Claims are irrelevant to the government's right to assert Wunderlich Act defenses. The critical facts are that, for whatever reason, the government declined to pay petitioner's claims, and that petitioner then brought suit on those claims. The Court of Claims has recognized that in those circumstances the government may litigate the validity of the agency disputes decision. See, *C. J. Langenfelder & Son, Inc. v. United States*, 341 F. 2d 600; *Acme Process Equipment Co. v. United States*, 347 F. 2d 538, 543-544 (Ct. Cl.); *Northrop Aircraft, Inc. v. United States*, 127 F. Supp. 597 (Ct. Cl.).

In *Langenfelder*, a contracting officer, dissatisfied with a disputes decision of the Administrator of the Federal Aviation Agency, with the apparent cooperation of the FAA's General Counsel, had persuaded the Administrator to reconsider the decision and refer the case back to the agency's contract appeals panel for a full rehearing. In the subsequent suit by the contractor based on the Administrator's initial decision, the Court of Claims held that the request for reconsideration by the contracting officer was untimely. 341 F. 2d at 604-605. Notwithstanding the fact that the suit had thus been occasioned by the bald refusal of the contracting officer to implement the administrator's decision, the court went on to consider the

government's Wunderlich Act defenses—which it rejected on the merits (*id.* at 606–612).

The second weakness in petitioner's assertion that the legality of GAO's action in this case must be resolved is that it was not the intervention of GAO that directly triggered petitioner's suit. Rather, it was the decision of the Commission not to pay petitioner's claims.¹² GAO merely advised the Commission that in GAO's opinion petitioner had no valid claims against the United States and, in effect, recommended that the Commission not pay petitioner. But GAO's recommendation could not and did not overrule the Commission's decision; the recommendation was not binding either on petitioner, the Commission, or the Court of Claims. Since the Commission could have ignored the GAO opinion and proceeded to final settlement of petitioner's claims, the only issue is whether the Commission's refusal to pay the claims may be judicially reviewed in the contractor's Court-of-Claims suit on the claims. Accordingly, we deem it

¹² Petitioner, if it had so chosen, could have initiated an action in the Court of Claims upon the Commission's order of November 14, 1963, directing payment of certain sums to petitioner, without waiting for completion of GAO's review of the claims. A GAO decision on pending contract claims is not a prerequisite to suit in the Court of Claims. See *Iran National Airlines Corp. v. United States*, 360 F. 2d 640 (Ct. Cl.); cf. *St. Louis, B. & M. Ry. v. United States*, 268 U.S. 169, 174. Moreover, with respect to the claims remanded to the contracting officer for further action, petitioner could have brought suit, without exhausting any further administrative remedies, if it became apparent that the officer was unreasonably delaying complying with the terms of the remand. See *C. J. Langenfelder & Son, Inc. v. United States*, *supra*, 341 F. 2d at 605.

unnecessary to discuss here the propriety of GAO's action.¹³

B. THE COMMISSION'S DECISION TO TAKE NO FURTHER ACTION ON PETITIONER'S CLAIMS WAS AUTHORIZED BY THE WUNDERLICH ACT AND DID NOT VIOLATE THE TERMS OF THE AGENCY'S CONTRACT WITH PETITIONER

As we have noted, our basic position is that upon *any* refusal to implement an agency disputes decision, the government is entitled in a subsequent suit brought by the contractor in the Court of Claims to raise Wunderlich Act defenses. We argue here that even if the Commission's decision not to pay petitioner's claims must be scrutinized as a prerequisite to the government's right to raise the statutory defenses, the decision was authorized by the Wunderlich Act and the contract with petitioner.

In the usual dispute proceeding, the final administrative determination of a contract dispute will be made by an agency board of contract appeals and the agency head—either on his own or after consultation with GAO or the Department of Justice—will decide

¹³ For GAO's views on the legality and effect of its consideration of petitioner's contract claims, see GAO App., *infra*, pp. 41-50. For a general discussion of the role of GAO in contract matters, see Cibinic and Lasken, *The Comptroller General and Government Contracts*, 38 G.W.L. Rev. 349 (1970); Shnitzer, *Changing Concepts in Government Procurement—The Role and Influence of the Comptroller General on Contracting Officer's Operations*, 23 Fed. B.J. 90 (1963); Birnbaum, *Government Contracts: The Role of the Comptroller General*, 42 A.B.A.J. 433, 491-492 (1956); see also 42 Op. Atty. Gen. No. 37 (September 22, 1969) (holding Comptroller General's ruling that the "Philadelphia Plan" for employment of minority employees on government contracts is invalid, to be non-binding upon contracting officers). Cf. *Miguel v. McCarl*, 291 U.S. 442.

whether to accept the board's decision (if in favor of the contractor) and authorize payment of the claim or withhold payment and force judicial review of the decision. While the boards are technically a part of the agency, the quasi-judicial functions are exercised independently—free from the direction and control of any other administrative authority. We agree with the analysis of the Court of Claims (App. 57-59) that their independence is enhanced, rather than diminished, by the fact that their decisions in favor of contractors can be subjected to judicial review.¹⁴

In the present case, which arose prior to the Commission's establishment of a board of contract appeals (see n. 4. *supra*), the Commission itself made the final administrative decision on petitioner's contract claims. But that fact, we submit, should not foreclose the Commission from deciding at a later date to withhold payment in order that there may be court review of its decision. Here, factors were brought to the Commission's attention by GAO which, at the least, cast some doubt on the soundness of the agency's decision. Even if the Commission viewed GAO's intervention as unauthorized and remained of the view that its decision in favor of petitioner was correct, it nevertheless may have concluded that sufficient doubts had

¹⁴ Petitioner's contention (Pet. Br. 68-72) that regulations authorizing boards of contract appeals to decide disputes clause appeals as "fully and finally" as their respective agency heads foreclose the agencies from seeking judicial review of the decision is without merit. Properly construed, the regulations merely establish that the boards have the final decision-making authority *within the agencies*; the regulations do not define the rights of the parties to review of agency decisions.

been raised to warrant court review under the Wunderlich Act standards before payment was made. In our view, the Commission has the right to withhold payment on contract claims whenever it concludes that significant doubts exist as to the validity of its decision under the prescribed standards or merely that the importance of the factual or legal issues raised warrant presentation to a court.¹⁵

If we are correct in our submission that an agency may bring about judicial review of its decision by withholding payment, then under the Wunderlich Act no provision of any contract can be pleaded in the resultant suit brought by the contractor as limiting that right. Thus, if the disputes clause in petitioner's contract were construed to prevent the Commission from withholding payment, the clause would be inconsistent

¹⁵ The brief of the American Bar Association as *amicus curiae* notes at pp. 15-16 that under the disputes clause of petitioner's contract a decision of a contracting officer, if not appealed by a contractor, is final and that the Wunderlich Act does not disturb that finality. It is asserted that the government's position in this case thus leads to the anomaly of according greater finality to the decisions of contracting officers than decisions of agency heads. The contracting officer, however, primarily represents the interests of the government, having the authority to enter into binding contracts and modification or settlement agreements on behalf of the government. See 41 C.F.R. (January 1, 1970) 9-1.450; *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321. Thus, in the absence of fraud, it can reasonably be expected that his decisions on contract disputes will adequately protect the interests of the United States. Decisions of quasi-judicial boards of contract appeals or agency heads, on the other hand, are more likely to be adverse to the interests of the government. See, e.g., House Hearings, p. 54 (roughly 50 percent of the cases heard by the Army Board of Contract Appeals from 1942-1950 were decided in favor of the contractor).

with the Wunderlich Act. As this Court noted in *United States v. Utah Construction Co.*, 384 U.S. 394, 413, "coverage of the disputes clause is a matter susceptible of contractual determination * * * subject to the limitations on finality imposed by the Wunderlich Act." In fact, the contract's disputes clause is not inconsistent with the Wunderlich Act as its controlling language—providing that a disputes decision of the Commission "shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence"¹⁰—embodies the same finality standards as the statute. Thus, the Commission's failure to implement its decision upholding petitioner's contract claims did not result in a breach of its contract with petitioner.

In an attempt to show that the government breached the contract, petitioner asserts that even if the Wunderlich Act permits both parties to the contract to obtain *judicial review* of disputes decisions, nothing in the contract permits attack of such decisions by either GAO or the Department of Justice, neither of which was a party to the contract (Pet. Br. 50-52). With respect to the identity of the "parties," the contract was entered into between petitioner and the United States, represented by the contracting officer (1R. 62). The Commission, GAO and the Department are all integral parts of the United States, cf. *Small Business Administration v. McClellan*, 364 U.S. 446,

¹⁰ The full text of the disputes clause is set forth at pp. 3-4, *supra*.

448-450, and thus are "parties" to petitioner's contract to the extent that they are charged by law with the responsibility of protecting the government's interests in that contract. As we have explained (see pp. 24-27, *infra*), the authority of GAO to intervene in this case need not be resolved as it was not GAO's decision, but the decision of the Commission in withholding further action, which forced petitioner into court. As we show at pages 32-36, *infra*, the Department of Justice is fully authorized to impose Wunderlich Act defenses in suits brought by contractors on the basis of agency disputes decisions.

Petitioner further asserts, however, that even if as a general matter either GAO or the Department of Justice is authorized to intervene in contract disputes determinations, the contract forecloses intervention here. Primary reliance is placed on this Court's pre-Wunderlich Act holding in *United States v. Mason & Hanger Co.*, 260 U.S. 323, that a contract payment authorized by a contracting officer and accepted by the agency, which decision was "final" under the terms of the contract, was binding on the Comptroller of the Treasury. The contract in that case, however, explicitly provided that the agency action was final and such a provision was not prohibited by statute. Under ordinary principles of contract law, the government—including the Comptroller of the Treasury—was bound by the terms of its contract. In the present case, however, the disputes clause did not, and could not under the Wunderlich Act, bestow finality upon the Commission's disputes decision. *Mason & Hanger* is thus not in point and does not bar either GAO or the De-

partment of Justice from meeting their responsibilities—whatever they may be—of protecting the interests of the government under the contract.

C. IN LITIGATION AGAINST THE UNITED STATES, THE DEPARTMENT OF JUSTICE IS AUTHORIZED TO RAISE ANY DEFENSE PERMITTED BY LAW.

Judge Skelton, dissenting below, accused the Department of Justice of seeking to become a "super reviewing agency," with power to overrule the decisions of other executive departments or agencies (App. 72-73). He could find no authority for the Department to "review the AEC decision in any manner different from a review by any other lawyer of his client's case to familiarize himself with the issues involved in preparation for a court trial" (App. 78). Petitioner is in "complete agreement" with these views (Pet. Br. 53). In our view, however, the Department's action in asserting Wunderlich Act defenses in this case did not exceed its traditional authority to conduct government litigation—an authority which differs markedly from the authority normally granted an attorney by a private litigant. Whatever "review" was made of the Commission's decision in the sense Judge Skelton used that term was made not by the Department of Justice but will eventually be made by the Court of Claims, in the traditional exercise of its judicial function.

Under 28 U.S.C. 516 and 519,¹⁷ the conduct of liti-

¹⁷ 28 U.S.C. 516 provides:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Depart-

gation in which the United States or a federal agency is a party is entrusted to the Department of Justice, under the supervision of the Attorney General. The statutes do not subject the authority thus conferred to the ultimate control of the agency whose decision may be the cause of the litigation. Thus, unlike attorneys representing private clients, the Attorney General cannot be replaced by his "client" for failure to follow instructions, but has the full responsibility to determine and defend the government's interest. See *Castell v. United States*, 98 F. 2d 88, 91 (C.A. 2), certiorari denied, 305 U.S. 652 (Attorney General had authority to enter into a stipulation settling and dismissing an income tax appeal without the approval of the Commissioner of Internal Revenue or the Secretary of the Treasury). Although not applicable to the Atomic Energy Commission, a 1933 Executive Order reorganizing certain executive agencies and transferring their litigation authority to the Department of Justice illustrates the breadth of the Department's control of government litigation. See Exec. Order No. 6166, set forth in the United States Code following 5 U.S.C. 901. Section 5 of that order states in part:

ment of Justice, under the direction of the Attorney General.

28 U.S.C. 519 provides:

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Indeed, in the Judicial Review Act of 1950, now contained in 28 U.S.C. 2341, *et seq.*, Congress explicitly again recognized the broad authority of the Attorney General to conduct all government litigation. In providing for judicial review of orders of various agencies, including the Atomic Energy Commission, Congress provided that "The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter" (28 U.S.C. 2348). It created an exception to this broad general authority of the Attorney General by providing that the agency can appear as a party and as of right in the review proceeding by its own counsel, and that the Attorney General may not "dispose of or discontinue the proceeding to review over the objection of any party * * *" (*ibid.*).

In the contract disputes area, once a contractor initiates litigation against the United States on the basis of a favorable agency disputes decision (as here), the Department of Justice does not automatically defend the agency decision, but undertakes to determine whether that decision is consistent with

Wunderlich Act standards.¹⁸ If the decision is vulnerable under those standards, then a valid defense exists to the contractor's suit. That the agency and the Department might differ in their evaluations of the correctness of the decision does not diminish the responsibility of the Department to determine the position the United States will take in the lawsuit. Only to enable it to make that determination, does the Department of Justice "review" agency disputes decisions. No attempt is made to interfere in the disputes process prior to litigation in the Court of Claims.¹⁹

Within these limits of authority, the Attorney General in 1969 suggested an appropriate procedure for reviewing agency disputes decisions favorable to contractors to determine which decisions should be sub-

¹⁸ To enable the Department of Justice to make that determination and otherwise defend the suit, the contracting agency is obligated to prepare for the Department a detailed report containing all pertinent information which the Department might need to conduct the litigation. 28 U.S.C. 520.

¹⁹ The power of the United States, acting through the Department of Justice, to recover funds wrongfully paid out, either by an affirmative action (see *United States v. Wurts*, 303 U.S. 414; *Wisconsin Central Railroad v. United States*, 164 U.S. 190; *United States v. Bank of the Metropolis*, 40 U.S. 377; *J. W. Bateson, Co. v. United States*, 308 F. 2d 510 (C.A. 5)) or through set off or counterclaim (see *United States v. Birchard*, 125 U.S. 176; *Acme Process Equipment Co. v. United States*, 347 F. 2d 538, 551-552 (Ct. Cl.); *Flippin Materials Co. v. United States* 312 F. 2d 408 (Ct. Cl.)) is not directly involved here. There is no need, therefore, to reach the question whether the Department of Justice could initiate a suit to recover funds paid by an agency on the basis of a contract disputes decision which the Department or GAO felt was deficient under Wunderlich Act standards.

jected to judicial review (42 Op. Atty. Gen. No. 33 (January 16, 1969)). The Attorney General suggested that contracting agencies should bring to the attention of the Department of Justice appeals board decisions which the agencies felt warranted litigation in accordance with the Wunderlich Act. Thereupon, the Department would make an "independent appraisal" whether suit could properly be litigated under the Act (*id.* at 10). Far from asserting a "super reviewing" authority over agency decisions, the Attorney General's opinion merely suggests a procedure whereby an agency can obtain an advance opinion on how the Department of Justice would litigate a disputes case should the agency withhold payment of an appeals board award in order to force a contractor into court. The *decision* would be made by the court, judicially.

To recapitulate, the Department of Justice "reviews" agency contract disputes decisions only upon initiation of a lawsuit in the Court of Claims by a contractor or upon reference of an appeals board decision for an appraisal of whether the decision is vulnerable under Wunderlich Act standards. The reviewing function in either case is fully consistent with, and an integral part of, the Department's responsibility to conduct government litigation. In the instant case, once petitioner initiated the action in the Court of Claims, the authority to decide whether to assert Wunderlich Act defenses rested with the Department of Justice and with it alone. Whether those defenses, if asserted, were valid was for judicial decision by the court, not by the Department of Justice.

III. THE GOVERNMENT'S OCCASIONAL CHALLENGE OF AGENCY DIS- PUTES DECISIONS WILL NEITHER OVERBURDEN THE COURTS NOR DESTROY THE UTILITY OF THE DISPUTES PROCESS

Petitioner asserts (Pet. Br. 18) that affirmance of the decision below will impose a needless and unwarranted burden upon administrative agencies and the courts and will thus bring an end to the disputes process, the chief purpose of which is to resolve contract disputes expeditiously (Pet. Br. 16). In our view, petitioner's fears are unjustified.

As an initial matter, the responsibility for determining whether judicial review of disputes decisions is preferable to absolute finality at the agency level rests with Congress, rather than the courts. The legislative history of the Wunderlich Act shows that the prevalent opinion among witnesses testifying at the hearings held following the *Wunderlich* decision was that passage of one of the proposed bills would not result in an overburdening of the courts. While an attorney of the Department of Justice suggested that a "flood of litigation" would result from the legislative overruling of the *Wunderlich* decision (Senate Hearings, p. 16), sharp disagreement with this view was expressed by industry spokesmen and one Congressman who pointed to the relatively few pre-*Wunderlich* cases in the Court of Claims (see Senate Hearings, p. 35; House Hearings, pp. 14, 32, 81, 86, 87-88). If these judgments were incorrect and Congress was acting on an invalid premise in providing for judicial review of agency disputes decisions, only Congress can now alter the legislation. But there is little evidence that the premise was invalid.

The Wunderlich Act itself permits only a limited judicial review of agency decisions. The Court of Claims in reviewing such a decision is not permitted to receive new evidence, but is restricted to deciding whether the agency decision is supported by "substantial evidence" in the administrative record.²⁰ *United States v. Carlo Bianchi & Co.*, 373 U.S. 709. Under these circumstances, it is unlikely that either a contractor or the government will go to the expense or trouble to seek review of the vast majority of agency decisions.

Moreover, although the volume of litigation has been substantial, there is no indication that the Court of Claims has been overwhelmed with Wunderlich Act litigation since the enactment of that statute. And the limited number of suits—which for the most part involve attacks by contractors on agency disputes decisions—cannot be attributed to a lack of knowledge on the part of the government that it too can obtain judicial review under the Act. It is now more than 6 years since the Court of Claims explicitly held in *C. J. Langenfelder & Son, Inc. v. United States*, 341 F. 2d 600, that the government was entitled to judicial review of agency contract disputes decisions in favor of contractors, and more than two and one-half years since the Attorney General suggested that contracting agencies establish procedures for determining which appeals board decisions might be vulnerable under

²⁰ The court must also decide whether the agency decision meets the other standards of the Act—i.e., not "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith * * *." 41 U.S.C. 321.

Wunderlich Act standards. 42 Op. Atty. Gen. No. 33 (January 16, 1969). Petitioner has pointed to no recent flood of government challenges to agency contract disputes decisions. Moreover, the Court of Claims—which presumably is in the best position to gauge the impact upon its docket of permitting the government to litigate under Wunderlich Act standards the validity of agency contract disputes decision in favor of contractors—apparently saw no cause for concern when in the present case it reaffirmed the government's right to do so.

Finally, there is the problem of the delay that judicial review—whether on behalf of a contractor or the government—occasions. It was more than 7 years ago that the Atomic Energy Commission rendered its decision on petitioner's claims, the better part of three of those years having been consumed by GAO's review and petitioner's presentation in connection with that review (App. 1-2; see GAO App., *infra*, p. 43). But it cannot be assumed that all cases in which the government asserts Wunderlich Act defenses will be as time consuming as this one.

With respect to the GAO action, we have already pointed out (see n. 12, *supra*) that petitioner was under no obligation to await completion of the GAO review before commencing this suit in the Court of Claims. Although the proceedings in the Court of Claims culminating in this Court's granting of certiorari have been time consuming—especially in view of the fact that the merits of the government's Wunderlich Act defenses have not yet been considered—it can be anticipated that future cases will proceed more

expeditiously once the complex issues presented herein are settled. In short, judicial review of agency disputes decisions will cause delays; but because of the limited number of cases in which review is likely to be sought and because delays such as have occurred in the instant litigation must be considered to be unusual, it is unlikely that the viability of the disputes process will be impaired.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.²¹

Respectfully submitted.

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SEPTEMBER 1971.

²¹ Petitioner concedes that, under 41 U.S.C. 322, no finality can attach to questions of law underlying agency disputes decisions (see Pet. Br. 57, 60). As the government in its answer below (App. 11-17) asserted that a number of legal questions were erroneously decided by the Commission, this case should—in the event that our interpretation of the Wunderlich Act with respect to questions of fact is not accepted—be remanded to the Court of Claims for consideration of those questions.

APPENDIX

VIEWS OF THE GENERAL ACCOUNTING OFFICE

[The views of the General Accounting Office on the legality and effect of its consideration of petitioner's contract claims are set forth herein. The Department of Justice, believing that the question of GAO's authority is irrelevant to the resolution of the issues presented by this case (see pp. 24-27, *supra*), expresses no opinion with respect to GAO's views.]

The majority opinion of the court below held that under the plain language of the Wunderlich Act, the government has a right to the same extent as a contractor to seek judicial review of an unfavorable administrative decision on a contract claim. It stated that in the court review it did not matter whether the failure of the agency to pay in accordance with the Board decision resulted from the action of the Comptroller General of the United States or from a change of heart in the agency itself; that in either event, a refusal by the United States to pay a Board award is not a breach of the disputes clause if the award is not supported by substantial evidence or otherwise is not entitled to finality under the Wunderlich Act (App. 48-49). Accordingly, the court ordered the case returned to its trial commissioner for his report and findings under the Wunderlich Act standards on the various contract claims considered in the Atomic Energy Commission's administrative decision. GAO believes that this ruling should be affirmed. However, since the dissenting opinions below and petitioner have made an issue of GAO's participation in this case, GAO believes it necessary to explain the basis for its action.

Very briefly, the facts involving its participation are these:

On March 27, 1964, the general manager of the Commission transmitted to GAO a letter dated March 6, 1964, from a Commission certifying officer requesting an advance decision whether an attached voucher could be certified for payment. The request was made pursuant to 31 U.S.C. 82d, which provides that:

The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification.

The voucher listed 3 items totaling \$32,297.73 for contract work involved in this suit. One of the items, for \$8,366.19, represented an amount withheld from petitioner because of the government's possible liability to another contractor due to petitioner's delay under the instant contract. A Commission hearing examiner had previously ruled that such withheld amounts should be paid to petitioner immediately while the amount of certain other allowed claims was being considered. As indicated by the certifying officer in his letter, however, petitioner's non-liability for the \$8,366.19 depended upon the propriety of the hearing examiner's allowance of time extensions under petitioner's major claims totaling about \$2 million.

Thus, the voucher brought into issue the propriety of the time extensions granted by the examiner on the major claims. In any event, GAO considered it its duty pursuant to the Budget and Accounting Act of 1921,

as amended (specifically, 31 U.S.C. 71, 74 and 82d), to go beyond the voucher items. Therefore, GAO requested and was furnished the administrative report based. Its initial consideration of the record led to certain tentative conclusions which were reduced to writing in a draft decision. A copy of the draft was furnished to petitioner, at its request, in February 1965 for comment and reply. At the same time, copies of the draft were furnished to the contracting officer and the Commission for the same purpose. Replies, in the form of briefs, were received in April 1965 from the contracting officer and in June 1965 from petitioner. In August 1965, the Chairman of the Commission advised GAO that, under the circumstances, he did not believe it would be appropriate or desirable for the Commission to comment on any proposed action by the GAO bearing upon the correctness and conclusiveness of the Commission's decision.

Thereafter, at petitioner's request, conferences were held at GAO on April 15 and April 20, 1966, during which the various issues in the Commission's disputes decision were discussed in detail. At the conclusion of the April 20 conference, petitioner requested that it be allowed to submit an additional brief which would be primarily directed at showing what items in evidence before the hearing examiner would constitute "substantial evidence" in support of the examiner's decision. The request was granted and petitioner submitted this additional brief in July 1966.

On December 5, 1966, the Comptroller General issued his decision, B-153841. The decision advised the certifying officer that the voucher could not be certified for payment and, in addition, stated that (46 Comp. Gen. 441, 544).

On the basis of the entire record in this case, as heretofore discussed in detail, it is our opinion that, in the several vital respects indicated

herein, the decision rendered by the Hearing Examiner on June 26, 1963, as reviewed by the Commission, fails to meet the requirements of the Wunderlich Act on material questions of fact and is erroneous on several material questions of law, as set out above. We must advise, therefore, that S & E Contractors, Inc., has no valid claim against the Government upon which an equitable adjustment, as ordered by the Examiner and the Commission, may be made. The Atomic Energy Commission will be furnished a copy of this decision and will be advised of our views.

(A detailed report of these facts can be found in the decision beginning at 46 Comp. Gen. 441.)

Petitioner contends that the GAO exceeded its audit authority by undertaking to review petitioner's claims which were not included in the voucher. The GAO decision advising the Commission not to pay petitioner's claims was not, strictly speaking, the actual settlement of an account. The ruling constituted merely an advance notice to the Commission that credit would not be allowed in its disbursing officer's accounts if petitioner's claims were paid administratively in accordance with the Commission's disputed decision. An advance decision does not require an agency head or an accountable officer to take specific action. But if an advance decision is disregarded, there could be a disallowance of any payments made in contravention of the Comptroller General's decision. See *United States ex rel. Brookfield Construction Co. v. Stewart*, 234 F. Supp. 94, 100 (D.D.C.), where the court stated:

As a matter of convenience, the Comptroller General may render advance rulings on questions whether certain payments, if made, would or would not be approved by him, 31 U.S.C. § 74, 3d paragraph. Such a course is conducive to fairness and efficiency. While the statute expressly authorizes the Comptroller General to

do so, it would seem that even in the absence of an explicit provision such an activity would impliedly be within his function. *Technically a decision of the Comptroller General upon a question so submitted to him, is not a legal opinion, but a ruling or an announcement that if certain payments were made by disbursing officers in the future, they would be passed or disallowed.* The disapproval would be binding and conclusive on the disbursing officer but not upon the person to whom the payment might be made. It would still be open to the latter to contest any claim for refund and interpose any defense that he may have. If the disbursing officer on the basis of the advance ruling of the Comptroller General declines to make a payment, it is open to the claimant to pursue a judicial remedy by way of a suit for money damages either in the Court of Claims or in an appropriate United States District Court, as the case may be * * *. [Emphasis supplied.]

As recognized in the *Brookfield Construction* case, the Office of the Comptroller General was conceived as one which would be vigorously active in protecting the public treasury against illegal expenditures. It is evident from the history of the Budget and Accounting Act of 1921, which created the GAO (42 Stat. 23), that the Comptroller General was intended to use his own initiative to seek out fiscal improprieties and not just stand on the sidelines waiting for problems to be brought to him. Congress obviously did not intend that the government's chief auditor and investigator in financial matters was to act only upon, and to be limited by, the invitation or request of the agency whose accounts were subject to his audit and settlement powers. The GAO finds no evidence in the Budget and Accounting Act or in its legislative history to indicate that GAO's advance decisions under its audit and account settlement powers should be

limited by the manner in which GAO learns of a proposed doubtful payment. Thus, even if the request for a decision under 31 U.S.C. 82d in the instant case had not required GAO to consider the hearing examiner's findings on the major claims, GAO submits that it had full authority to do so. See, e.g., *Northrop Aircraft, Inc. v. United States*, 127 F. Supp. 597 (Ct. Cls.), where GAO acted on its own initiative without a request for review by either the contractor or the contracting agency, and the court agreed with GAO's conclusion.

Petitioner contends, however, that the GAO has a very limited function under the Wunderlich Act and that in the instant case it exceeded its authority by purporting to act as a Court of Claims and overturning the administrative decision. It should be clear from the legislative history of the Wunderlich Act that GAO neither sought nor desired to become another Court of Claims in the contract disputes area. It did seek throughout the legislative consideration of the Wunderlich Act to obtain for the government the same right to judicial review that contractors would have. See House Hearings pp. 39, 135; Senate Hearings, p. 12. In order to better assure that such rights by the government could and would be exercised in appropriate instances, GAO felt that its normal settlement and oversight functions under the Budget and Accounting Act should be recognized and not curtailed by the new legislation.

By endowing administrative disputes findings with near absolute finality, this Court's decisions in *United States v. Moorman*, 338 U.S. 457, and *United States v. Wunderlich*, 342 U.S. 98, severely limited GAO's ability to carry out its statutory responsibilities in regard to contract payments. By letter of December 30, 1953, the Comptroller General sent the House Committee on

the Judiciary a proposed substitute bill which he believed would restore GAO to the position it had before the *Moorman* and *Wunderlich* cases. See House Hearings, p. 136. Except for the words "in any suit now filed or to be filed," the Comptroller General's substitute bill constitutes the present language of the Wunderlich Act. See H. Rep. No. 1380, 83d Cong. 2d Sess., p. 6. Finally, the House report spells out explicitly the legal effect intended by deletion of the reference to GAO in an earlier version of the proposed legislation (*id.* at p. 7);

The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office. It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, *shall apply the standards of review that are granted to the courts under this bill.* At the same time there is no intention of setting up the General Accounting Office as a "court of claims." Nor should the elimination of the specific mention of the General Accounting Office in the bill be construed as limiting its review to the fraudulent intent standard prescribed by the Wunderlich decision. [Emphasis supplied.]

For a brief discussion of this history, see *C. J. Langenfelter & Son v. United States*, 341 F. 2d 600, 608 (Ct. Cl.).

The GAO never has viewed itself as exercising judicial power in either the contract or any other area. As indicated, it rejected such authority when the Wunderlich legislation was being considered. Rather, as Congress intended, the GAO views itself as an

intervenor whose actions can precipitate judicial review of a contract dispute under the standards of the Wunderlich Act, recognizing always that the Attorney General, who has the final word in matters of litigation, will decide to prosecute or defend any suit resulting from its intervention.

Judge Collins in his dissenting opinion reads the majority opinion as meaning "that the Government, after deciding that its contractor's claim is meritorious, based on a *preponderance* of the evidence presented to it, can then turn around and reject the claim because there is *substantial* evidence (i.e., less than a preponderance) to support the opposite result" (App. 95). The GAO does not agree. Neither the GAO nor the Department of Justice has contended that the Commission decision should be overturned because there is substantial evidence to support the opposite result. Instead, the GAO alleged that there is a lack of substantial evidence to support the Commission decision in favor of the contractor.

Judge Skelton in his dissent cites *James Graham Mfg. Co. v. United States*, 91 F. Supp. 715 (N.D. Cal.) as holding that GAO "is without authority to overturn the decision of a contracting officer, a Board or an executive agency, in contract cases involving the standard disputes clause, in the absence of fraud or overreaching" (App. 69-70). The *Graham* case involved a decision of a contracting officer allowing an item of contract cost. There was no disagreement between the contractor and the contracting officer, but GAO challenged the payment in question and the court held that the contracting officer's determination of cost was final under the terms of the contract, absent fraud or overreaching. *United States v. Mason & Hanger Co.*, 260 U.S. 323, held to the same effect.

The GAO believes that these cases are inapplicable to the issue at hand. There is a fundamental distinction between the decision of a contracting officer and that of a Board of Contract Appeals—a distinction that explains why the GAO believes that the government is not bound by Board decisions in the same way it is bound by decisions of contracting officers.

Contracting officers have the authority to enter into and administer contracts in behalf of the government and to make determinations and findings with respect thereto. See Atomic Energy Commission Procurement Regulations, 41 CFR 9-1.450; *United States v. Corliss Steam-Engine Company*, 91 U.S. 321. In other words, the contracting officer speaks for the government so far as the contractor is concerned. Consequently, when a contracting officer and a contractor enter into a settlement or amendment agreement under a contract, such agreements are binding on the government. *Mason & Hanger and Graham, supra*.

Under petitioner's view of the disputes procedure, a Board of Contract Appeals would function as an extension of the contracting officer. Its decision would be binding on the government to the same extent as a contracting officer's decisions. The GAO thinks this view of the Board is incorrect. Boards function as independent tribunals, much like courts. Contracting officers, on the other hand, are expected to represent the government's interests. This distinction between a Board and a contracting officer is important: Boards of Contract Appeals should function as independent adjudicators of contract disputes, with both parties having equal rights to challenge their decisions.

In conclusion, GAO believes that the relevant issue before the Court is not what GAO did, or could do. The issue is whether the petitioner can plead the finality of

the administrative decision without regard to the Wunderlich Act. In effect, GAO believes that petitioner is urging a finality which is specifically prohibited by that act. GAO submits that the case should be returned to the Trial Commissioner as the Court of Claims ordered for his report and findings on the petitioner's claims under Wunderlich Act standards.

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**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1971

No. 70-88

S&E CONTRACTORS, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CLAIMS**

PETITIONER'S REPLY BRIEF

SUMMARY

The Government's argument is that it has a right to a judicial review of an agency disputes decision under the Wunderlich Act since that Act itself makes no reference to either party. There is an appealing attraction to the idea that plain words suggest a plain meaning, but the history of the Wunderlich Act convincingly rejects the Government's interpretation. That history shows an unsuccessful effort to obtain for the Government a right—to be assertable by the GAO—to question the merits of an agency's final decision on contract matters. The bills that contemplated such a role for the GAO were rejected and, further, at no point during the hearings was it ever

advocated that, apart from the GAO, the contracting agencies themselves, or some other governmental arm, should be vested with authority to seek judicial review in behalf of the Government.

The only reason this case is in court today is because of the GAO. The very authority that had been denied that office under the Wunderlich Act was improperly used by it in this case to usurp the responsibility, authority and powers of the Atomic Energy Commission and interfere with that agency's contractual relationship with Petitioner, at a point in time when both parties (the AEC and Petitioner) had concluded their agreed-upon disputes procedure in Petitioner's favor. This was accomplished by an advance notice of disallowance, preventing the AEC from implementing its final disputes decision.

We say it is a specious and illogical argument to defend the non-payment of Petitioner's claims under the broad, general theory of a "right to judicial review." But for the GAO there would never have been any litigation. The whole line of reasoning for the allegation that the Government has a "right to judicial review" fails because of the failure of the major premise. The case therefore has no standing in court on a "Wunderlich Act" review.

For the same reason we submit that the question of the powers and duties of the Department of Justice to conduct litigation in behalf of the United States, as advanced by the Government, are not material.

The Government also argues here that by acquiescing in the GAO advance notice of disallowance and directive not to pay Petitioner's claims, the AEC has repudiated its final decision and that this is the precipi-

tating cause of the controversy. This is incorrect in fact. It is negated not only by the AEC's own language that it would "... take no action ... inconsistent with the views expressed by the Comptroller General" (App. 10), but by the position of the Comptroller General as well. (Govt. Br. 44)

Finally, viewing this case from the standpoint of the orderly functioning of the Government, in terms of its relationship with contractors, and in terms of the audit functions that are carried out by the GAO, there is neither need nor justification for judicial review of agency disputes decisions. The Government is adequately protected by the management and legal staffs of the contracting agencies who are fully qualified to act upon the issues of fact and law which may develop in a controversy between a contractor and the Government. This is true both at the contracting officer level as well as in the contract appeal board levels. Intervention by the GAO should be restricted to cases of fraud or overreaching.

I. THE WUNDERLICH ACT, BY ITS TERMS, CONFERS NO RIGHT UPON THE GOVERNMENT TO OBTAIN JUDICIAL REVIEW OF AN AGENCY DISPUTES DECISION. THE HISTORY OF THE ACT REFLECTS AN EXCLUSION OF THE GAO FROM THE PROVISIONS OF THE LAW BECAUSE OF OPPOSITION TO THE PRINCIPLE OF COEXTENSIVE REVIEW.

The Government's brief takes the position that even though Congress did not adopt a proposed Wunderlich bill which would have specifically granted the GAO authority to intervene in the agency disputes process, nevertheless, the Wunderlich Act—as enacted—was intended to, and did give to the Government, a right to a judicial review of agency disputes decisions coex-

tensive with that permitted a contractor under the terms of that law.

The language of the statute is the starting point for this argument. According to the Government, since there is nothing in the wording of the Act to suggest that its provisions should be applicable only to decisions adverse to a contractor, it follows therefore that no one may assert the finality provision of a Government contract to bar judicial review. The argument begs the question. The root issue is whether the Government has a right, *in the first instance*, to refuse payment on an agency decision favorable to a contractor in order to force judicial review. On this issue—which is the determinative issue in this case—the statute provides no answer whatsoever.

Historically, the right of access to the courts to seek judicial review of an adverse disputes decision was a right that belonged to the contractor alone. The restoration of that right was the purpose of the Wunderlich Act. The argument is now made that the Act also subsumed a congressional intent to provide for judicial review when initiated by the Government. We strongly disagree.

One of the most pervasive themes in the legislative history of the Wunderlich Act was the opposition expressed, by Government and industry alike, to the proposed bill that would have recognized a right in the General Accounting Office to intervene in the administrative disputes process. Because of that opposition—which was directed mainly to the impairment of finality that would result—the GAO was taken out of the bill (Pet. Br. 28-33, 42). This notwithstanding, the Government now urges this Court to disregard the role played by the GAO in this case because the legislative

controversy over the GAO "did not overshadow the substantial support for a judicial review that would work both ways." (Govt. Br. 9) This argument reduces the controversy over the GAO to a nullity.

To begin with, the statements and comments that comprise the Government's argument on the legislative history deal, in the main, with those legislative proposals in the 82d Congress and in the early 83d Congress that expressly provided a role for the GAO in the disputes process. The Government, in other words, supports its case, not in terms of the law that was enacted, but in terms of the law that might have been. Even assuming the validity of such an approach to statutory interpretation, the more important point is that there is a convincing lack of proof that Congress was ever asked to consider, or did in fact consider, a Government right to obtain court review of an agency decision through any means *other than* by the intervention of the General Accounting Office in the disputes process.

Repeatedly during the hearings, when support was voiced for the idea of protecting the Government's interest against erroneous contract decisions, the GAO was seen as the way to secure that end, not the contracting agencies or the Justice Department as the Government now claims. This thought was expressed not only by representatives of private industry—for example, George Leonard speaking for the Wunderlich Contracting Company had stated during the first day of the House hearings that, under then existing law, the right to appeal a contracting officer's decision was open neither to the contractor through the courts nor to "the Government through the GAO" *Hearings Before Subcommittee No. 1 of the House Committee*

on the Judiciary, 83d Cong., 1st & 2d Sess. 7 (1953, 1954)—but was stated with equal clarity by Government representatives. See, for example, the statement of E. L. Fisher, Counsel for the General Accounting Office (*id.* at 42), the testimony of U. Bonnell Phillips, Assistant to the Assistant Attorney General, Civil Division, Department of Justice (*id.* at 52) and the testimony of J. H. Macomber, Jr., Associate General Counsel, General Services Administration (*id.* at 59).

Indeed, the very witnesses whose statements the Government now relies upon to support its argument, were referring not to agency-initiated review, or review in the abstract, but court review to be realized through the mechanics of GAO intervention. For example, Frank L. Yates, the Assistant Comptroller General, in stating his dissatisfaction with S. 2487 said: "no provision is made therein for a review of decisions of administrative officers by the Government, through the General Accounting Office." *Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 82d Cong., 2d Sess. 10 (1952). Mr. Yates did not express the need for protection of the Government's interests in any terms *other than* the GAO. Nor did John C. Hayes, Counsel for the Associated General Contractors of America. When this association initially went on record in support of coextensive review (a position which they later changed¹), Mr. Hayes said:

This legislation as finally adopted should interpose no bar to further administrative review by an

¹ Throughout its brief the Government relies upon testimony that was directed to legislative proposals that either contemplated or did specifically include the GAO. The fallacy of proving this case by relying upon such testimony is well illustrated in the position taken by the Associated General Contractors of America. Orig-

agency of government wholly independent of the department, agency, or bureau involved in the dispute. Hence, there should be little or no additional burden placed on the courts. (*Id.* at 30)

That Mr. Hayes did not have in mind a right of judicial review to be implemented by the contracting agencies themselves could hardly have been made clearer. The same is true of the other witnesses upon which the Government relies.²

Given this constant identification between a Government right of review and the GAO as the means of obtaining that end, there is no basis upon which to find that Congress could have intended to preserve for the Government a right of review over agency decisions when the bill that it enacted specifically deleted all reference to the GAO. And especially is this so when

inally, as the Government's brief points out, the Association did support Government review (Govt. Br. 15, 20) but what is overlooked is that, at a later point in the House hearings, when opposition to the GAO had crystallized, the Association joined the Department of Defense in opposing S. 24. The Air Force opposed the bill because it saw the finality of its decisions being impaired (Pet. Br. 42) and the Association, in joining that opposition, went on record for the proposition that it was "primarily interested in the early enactment of legislation which will assure members of our industry the right of judicial review." 99. Cong. Rec. 4598.

² Gardiner Johnson (Govt. Br. 15) stated: "I understood that they [the GAO] simply wanted practically the same right that the contractors are requesting, to take an appeal from what they consider to be an unfair and unreasonable decision." (*Senate Hearings* at 84) Elwyn L. Simmons, president of a contracting company (Govt. Br. 18) urged legislation to protect the contractor and said that, at the same time, he had no objection to the inclusion of the GAO in the bill. (*House Hearings* at 5) Alan Johnstone, a private attorney, (Govt. Br. 18) identified the GAO as that office "which objectively watches over the enormous expenditures of the Government, especially in its defenses" and, on that ground, defended its inclusion in the then-pending bill (*House Hearings* at 20).

one considers the fact that the opposition which had been voiced against the GAO was directed, not against that office *per se*, but against the threat to the principle of finality that it represented.

The fact is that Congress did not see its amended bill as granting any right of judicial review to the Government. Late in the House hearings, when the amended bill came under consideration, the point was raised during the testimony of Franklin Schultz that coextensive review remained a danger even under the amended bill. Congressman Edwin E. Willis, a member of the House Committee, questioned this:

MR. WILLIS. I do not know that I follow your last point. What danger do you anticipate?

MR. SCHULTZ. The danger I anticipate is that the GAO may rely on the wording of this bill and the legislative history to permit it to reverse for lack of substantial evidence, a contracting officer who has made a decision favorable to the contractor

MR. WILLIS. This judicial review referred to in that passage there referring to a review by GAO, when GAO has been left out deliberately as compared to S. 24?

MR. SCHULTZ. Well, that is persuasive, sir
(*House Hearings* at 110, 111)

The Government is quite correct when it says that Mr. Schultz' testimony "did not refer to the fact that the agency itself or the Department of Justice might be involved in the government's decision to force judicial review." (Govt. Br. 22). It only begs the obvious to state the reason for this "omission": The idea of an agency appealing from its own disputes decision was totally alien to the history of Government-Contractor dealings under the disputes clause.

Further, if it ever were the case that the contracting agencies saw themselves as occupying a status sufficiently alien to their own decisions so as to warrant the desirability of obtaining judicial review, the problem could have been solved simply through change in contract language. No statute bound the agencies to adhere to the disputes clause and revision of that clause was at all times an administrative option.

The fact of the matter is that the contracting agencies, in particular the Department of Defense, were opposed to any impairment of the finality of their decisions beyond that which was necessary to secure the contractor's right of access to the courts. From the Defense Department's point of view, coextensive review was neither necessary nor desirable. Thus, in opposing the inclusion of the GAO in the proposed legislation, Roger Kent, General Counsel for the Department of Defense, had stated that:

This would defeat the aims of both the Government and its contractors by making it impossible to accomplish the very purposes of the disputes clause; i.e., the achievement of proper and expeditious performance of contracts. (*House Hearings* at 132)

At the same time, however, the Department of Defense was distinctly aware that, having retained, by contract, the power to decide its own disputes, essential fairness required that contractors be guaranteed the right of access to the courts that they had enjoyed before the decision in *United States v. Wunderlich*, 342 U.S. 98 (1951). To achieve that end, Leonard Niederlehner, Deputy General Counsel for the Defense Department, testified before the Committee that his department had modified its disputes clause to limit finality by providing for review of the decision of the

head of the department by a court of competent jurisdiction under such criteria as fraud, arbitrariness, capriciousness or gross error implying bad faith. By these arrangements, he said, "we . . . have stipulated finality in our contracts to a degree which represents the interpretation of the courts as to finality before Wunderlich." "The arrangements which we have made are now adequate to protect the contractor." (*House Hearings* at 53) The Government's reference to this witness' statement about review in courts of competent jurisdiction (Govt. Br. 20, 21) should be read in the full context in which that statement was made. The Department of Defense never advocated the position of coextensive review which the Government now seeks to attribute to it.

The House Judiciary Committee Report that accompanied the final bill (H. R. Rep. No. 1380, 83d Cong., 2d Sess. (1954)), makes no mention of the novel construction of the Wunderlich Act that the Government now urges this Court to adopt. Certainly a right of the Government to obtain review of its own disputes decisions through a withholding of payment—representing as it does so drastic a departure from the practice and thinking that had obtained before the Wunderlich decision—would have demanded explicit comment by the House Committee. But such thoughts do not appear;³ the single statement from that report which the

³ It is significant to note that while the House Report borrowed from the language that had appeared in the earlier Senate report that accompanied S. 2487 (the amended version of that bill which specifically included the GAO) it did not repeat that language from the Senate report which acknowledged that a decision of a contracting officer might operate not only to the disadvantage of a contractor, but "also operate to the disadvantage of the Government in those cases, as sometimes happens, when the contracting officer makes a decision detrimental to the Government interest in the claim." (S. Rep. No. 1670, 82d Cong., 2d Sess. 2 (1952))

Government has chosen to include in its brief (Govt. Br. 22) most certainly does not bear out the Government's argument. That statement only reiterated thoughts that had been expressed several times during the hearings, namely, that, unless Government contracts were made mutually enforceable (meaning that the contractor should be provided with a forum in which his disputes would be given objective evaluation) the Government would become the loser in the long run. Further, the House report specifically points out that objection to the GAO had been predicated on Defense Department and industry fear that "inclusion of the Controller (sic) General in the wording of the bill would destroy the finality which existed under the Defense Department procedures." (H.R. Rep. No. 1380, 83d Cong., 2d Sess. at 2)

Not only does the committee report fail to support the Government's interpretation of the Wunderlich Act, but actual practice under that Act is contrary to the Government's point. Suits under that Act have been contractor suits seeking reversal of an adverse administrative decision, not suits, like this one, which was brought to enforce a payment that the contracting agency had earlier determined was due. The Government claims that this absence of agency-instituted Government "appeals" (i.e., forcing a contractor's suit by withholding payment) "cannot be attributed to a lack of knowledge on the part of the government that it too can obtain judicial review under the Act." (Govt. Br. 38) We think it can be attributed to nothing else but that. Why, for example, if the point is as certain and clear as the Government now claims it to be, should the GAO have sought to justify its unauthorized intervention in this case by claiming that:

Where, as here, the disputes procedure has been exhausted in the contracting agency, there would

be no further channel open to remedy an erroneous Disputes clause decision against the Government's interest unless our Office exercised its traditional jurisdiction to question such a decision. 46 Decs. Comp. Gen. 441, 458 (1966)

Why should the Department of Transportation have seen it necessary to propose a change in its procurement regulations specifically to permit review of its own disputes decisions (Pet. Br. 72, n. 16) if, as the Government now claims, the agencies always had that right under the Wunderlich Act? And why should this Court have described the standard disputes clause procedure in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 399 (1966) as one involving Tucker Act suits brought into the Court of Claims by "the contractor".⁴

The answer to these questions is obvious: Congress never intended to vest the contracting agencies (or for that matter, any other governmental arm) with authority to withhold payment on a favorable contractor disputes decision in order to force judicial review by compelling the contractor to seek relief in court. The consensus of thought only confirms the point.

In summary, we submit that the Government's argument does not meet the issues in this case. It builds almost entirely upon that language in the legislative history that was specifically directed to the GAO and

⁴ The language referred to reads as follows:

Appeals from the decision of the contracting officer are characteristically heard by a board or committee designated by the head of the contracting department or agency. Should the contractor be dissatisfied with the administrative decision and bring a Tucker Act suit . . . in the Court of Claims . . . the finality accorded administrative fact finding is limited by the provisions of the Wunderlich Act . . . *United States v. Utah Constr. & Mining Co.*, 384 U.S. at 399.

the protection to the Government that would be secured through that office, and, it asks this Court to assume that a congressional intent to provide for coextensive review remained even after the GAO was taken out of the legislation. The argument ignores the very reason for the opposition that was voiced against the GAO, it ignores the telling silence of the committee's report, and it ignores the fact that the only judicial decision that offers any comfort to the Government's argument is the Court of Claims' opinion in *C. J. Langensfelder & Son, Inc. v. United States*, 169 Ct. Cl. 465, 341 F. 2d 600 (1965), the dictum of which was later expanded into a holding for the decision below.⁵ The problem of

⁵ The Government also cites the Court of Claims' decisions in *Northrop Aircraft, Inc. v. United States*, 130 Ct.Cl. 626, 127 F.Supp. 597 (1955) and *Acme Process Equipment Co. v. United States*, 171 Ct.Cl. 251, 347 F.2d 538 (1965) as support for its contention that payment upon final agency disputes determinations may be refused in order to force the matter into litigation. (Govt. Br. 25) The cases do not support the argument for which they are offered. The *Northrop* case did not involve a dispute arising under the contract nor a wrongful refusal on the part of the Government to pay over money that was due. At issue in that case was simply the Government's right to recover its proportionate share of the interest earned on a tax refund, the principal amount of which had earlier been permitted as an element of reimbursable cost under the plaintiff's CPFF contract. No contract provision was cited as bearing upon plaintiff's duty to refund. The duty to refund, said the court, "arises in equity and good conscience by natural implication from the principles of a CPFF contract." (130 Ct.Cl. at 629, 127 F.Supp. at 598) The *Acme* case involved a situation where a contractor brought a Wunderlich Act suit in the Court of Claims seeking to reverse a partially adverse Board determination while claiming, at the same time, that that aspect of his contract claim which had been favorably resolved by the Board was immune from re-examination by the court. We have never contended that the Wunderlich Act estops the Government from "opening up" a Board decision in a situation where the contractor is the one who freely brings suit because of alleged errors in a Board decision.

statutory interpretation raised in this case involves only one issue—the significance of taking the GAO out of the Wunderlich legislation. For the many reasons earlier stated, (Pet. Br. 37-49), it is Petitioner's position that the GAO's intervention in this case effected a breach of contract.

II. THE AEC DID NOT MAKE A DECISION NOT TO PAY PETITIONER'S CLAIMS. IT WAS FORCED INTO ITS POSITION BECAUSE OF THE UNAUTHORIZED INTERVENTION OF THE GAO AND THE POWER INHERING IN THAT OFFICE TO COMPEL ADHERENCE TO ITS OWN VIEWS ON THE MERITS OF A CLAIM BY DISALLOWING CREDIT IN THE ACCOUNT OF A CERTIFYING OFFICER.

The Government's second principal argument is that the actions taken by the GAO in this case are irrelevant because—according to the Government—"it was not the intervention of GAO that directly triggered petitioner's suit . . . rather, it was the decision of the Commission not to pay petitioner's claims." (Govt. Br. 26)

It should be made clear to the Court that the issue of who precipitated Petitioner's suit is a consideration chiefly relevant to the Government's argument, not our own. It has never been our contention that the Wunderlich Act was meant to deny only to the GAO the right to compel judicial review of agency decisions favorable to a contractor. Rather, throughout these proceedings, it has always been Petitioner's position that under the Wunderlich Act no arm of the Government—whether that be the GAO or a contracting agency—should have a right to refuse payment upon a disputes decision in favor of a contractor.⁶

⁶ Our brief acknowledged the fact that even though the Wunderlich Act was intended for the benefit of contractors alone, a contracting agency could avail itself of the review standards of that

The Government attempts to have this Court avoid the question posed by the GAO's intervention for one reason only: That intervention exceeded not only the authority that the GAO was meant to exercise under the Wunderlich Act (see Pet. Br. 47, 48) but, at the same time, it exceeded the historically recognized limits of its inherent authority (Pet. Br. 38-41; *infra*, p. 22, Petitioner's Reply to the Views of the GAO). It is to escape this dilemma, and, at the same time to support the legitimacy of its own role in this case, that the Justice Department now makes the claim that Petitioner's suit was "directly triggered" by the contracting agency itself. The facts are otherwise.

Extensive administrative proceedings were held in connection with Petitioner's claims. These are fully stated in our brief (Pet. Br. 9, 10). We stress here that, at the conclusion of those proceedings, the head of the contracting agency (the Commissioners of the AEC) ordered the contracting officer:

... to proceed to final settlement or decision [on the payment of Petitioner's claims] in accordance with the decision of the hearing examiner dated June 26, 1963, as modified by our order of November 14, 1963, and by this decision. 2 AEC Rep. 850, 856 (1964)

Act if it were to reserve such a right by appropriate contract language and, at the same time, undertake to make the correspondingly necessary changes in its applicable procurement regulations. (Pet. Br. 58, n. 10) This position in no way undercuts what we contend to have been the purpose underlying the Act because it was (and still is) open for the agencies to rewrite their disputes clauses so as to provide for complete and coextensive review. The Wunderlich Act does not change that option in the slightest.

The Commission's decision was never implemented and the reason, of course, was the fact that the GAO intervened, re-decided the case and reached a different conclusion. Before this Court, the Government's contention is that non-payment reflects a "decision of the Commission not to pay petitioner's claims" (Govt. Br. 26), whereas, before the Court of Claims, the Government made the point that "the Commission has not repudiated the decisions involved in this matter." (R. Defendant's Request For Review of the Commissioner's Recommended Opinion at 14, n. 4) However the Government may wish to characterize the Commission's actions, the truth of the matter is that those actions were taken not by choice, but by forced necessity—what the court below aptly described as "the Comptroller General's implied threat to charge the certifying officer's account. . . ." (App. 49)

It is this authority in the GAO—the power to charge a certifying officer's account, to disallow credit—that goes to the heart of the matter. Unless these consequences can be ignored or avoided by the paying agency, the GAO can use this authority to make its interpretation prevail and thereby extend its jurisdiction. As one eminent authority has put it, the Comptroller General "can *decide* what he cannot *prove*."⁷ Thus, for the Government to now claim that the agency made a "decision" not to pay and to suggest, as the Government also does, that the "Commission could have ignored the GAO opinion and proceeded to final settlement. . . ." (Govt. Br. 26) is simply to ignore the

⁷ The reference is to Mansfield, *The Comptroller General*, 96 (1939).

reality of the situation.⁸ It is an argument that elevates form over substance.

It was precisely in this light that Judge Skelton saw the situation. He said: "The AEC never at any time reversed, modified, canceled, set aside, or changed its final decision between the time it was issued on May 13, 1964, and the date this suit was filed on April 11, 1967, or thereafter." (App. 63) At the same time, Judge Skelton also saw the actions of the GAO in this case as going beyond the authority of that office. (App. 69) It was the combination of these two factors—the contracting agency's unabated adherence to its own final decision and the undermining of that decision by an exercise of unauthorized authority by the GAO—that led Judge Skelton to attack the Justice Department's assertion of the Wunderlich Act defense in this case. The Government's response to that attack (Govt. Br. 32-36) is a discussion that is irrelevant to the issues. Neither Judge Skelton—nor Petitioner in supporting his views—ever challenged the right of the Department of Justice to conduct litigation involving the United States *in a case otherwise properly before a court*. The whole point of Judge Skelton's position, and our own as well, is that the Justice Department

⁸ The Court need not speculate as to whether payment by the Commission would have resulted in disallowance. The Government's own brief tells us it would have. The "Views of the General Accounting Office", included in an appendix to the Government's Brief (at 41-50) state:

... The GAO decision advising the Commission not to pay petitioner's claims was not, strictly speaking, the actual settlement of an account. The ruling constituted (sic) merely an advance notice to the Commission that credit would not be allowed in its disbursing officer's accounts if petitioner's claims were paid administratively in accordance with the Commission's disputed decision. ... (Govt. Br. 44)

rationalized its role of defense attorney in this case by postulating a unique (and erroneous) construction of the Wunderlich Act and, within that framework (since it could not defend the GAO intervention) hypothesizing an agency rejection of a disputes decision that never happened. In short, a bootstrap approach.

III. BY AGREEING TO THE DISPUTES CLAUSE, THE CONTRACTOR GIVES UP HIS COMMON LAW RIGHTS TO STOP WORK AND SUE IN BREACH OF CONTRACT, IN EXCHANGE FOR OBTAINING A PROMPT DECISION BINDING ON THE AGENCY.

The Government contends that affirmation of the decision below will not impair the viability of the disputes clause. The argument which is now urged upon the Court in support of that decision offers convincing reasons to the contrary.

By the terms of the disputes clause, a contractor is obligated to proceed diligently with performance of the disputed work pending the resolution of a contract dispute—an obligation that carries with it the substantial burden, for the contractor, of financing the work that is the subject of controversy. The *quid pro quo* for this relinquishment of the right to stop work and the burden of financing continued performance is the Government's promise to provide procedures that offer a fair, just and inexpensive means of promptly settling disputes arising under the contract. Within this framework, the long-accepted interpretation of the disputes clause has been that the quasi-judicial decisions rendered on contractor claims by a representative of the agency head were treated as final unless appealed to the courts by the contractor.⁹

⁹ Contrary to the Government's description, the "usual dispute proceeding" has never involved a before-payment review of board decisions in favor of a contractor by either an agency head acting

The Government now argues in favor of a system where finality for the contractor can never be secured except in the courts. Contract appeal board decisions, though held out as an agency's final decision by contract language and supporting regulations (Pet. Br. 68-71), are to be made subject to review and disavowal by an agency head, acting "either on his own or after consultation with GAO or the Department of Justice . . ." (Govt. Br. 27) and decisions of agency heads may be

alone or in consultation with the GAO or the Department of Justice (Govt. Br. 27-28). Board decisions have always been regarded as *final* decisions. What, in fact, the Government is describing is the Attorney General's own conceptualization of the disputes process, as it was envisioned in 42 Ops. Att'y Gen. No. 33 (January 16, 1969). It was then that the idea of agency head review of board decisions was first articulated and the idea has no support in long-standing practices of the agencies in disputes proceedings.

Further, the Government makes a grave and serious error when it describes the contracting officer's role in the disputes process as one who "primarily represents the interests of the government" (Govt. Br. 29, n. 15) and whose decisions "are expected to represent the government's interests." (Govt. Br. 49) It is elementary that a contracting officer, in making a decision under the disputes clause, acts in a *quasi-judicial* capacity and must use his independent judgment "with due regard to the rights of both the contracting parties." *Ripley v. United States*, 223 U.S. 695 (1912); See also *Morgan v. United States*, 298 U.S. 468, 480, 481 (1936); *Penner Installation Corp. v. United States*, 116 Ct.Cl. 550, 563, 89 F.Supp. 545, 547 (1950); *Climatic Rainwear Co., Inc. v. United States*, 115 Ct.Cl. 520, 559, 88 F.Supp. 415, 421 (1950). This attempt to stigmatize a contracting officer's disputes determination with an inherently pro-Government bias is made in an effort to explain away the fact that the Wunderlich Act, by its terms, does not apply to decisions of contracting officers; hence it offers no basis upon which the Government could ever obtain judicial review of a contracting officer's decision favorable to a contractor. Thus, in terms of the argument which the Government now makes, it means that agency decisions rendered at a subordinate level are immune from attack while decisions of the agency head become subject to such an attack.

disavowed, either, because the GAO may "cast some doubt on the soundness of the agency's decision" (Govt. Br. 28) or "merely . . . [because] the importance of the factual or legal issues raised warrant presentation to a court" (Govt. Br. 29). Few contractors could survive this maze of "second guessing". The Petitioner was among those who could not. The Government's argument is directly contrary to the provisions of the disputes clause and contrary to this Court's admonition that the disputes procedure is founded on the belief "that resort to administrative procedures is an expeditious way to settle disputes, conducive of speed and economy." (Footnote omitted) *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966).

There is a final point that requires comment. The Government's brief says that "Petitioner concedes that, under 41 U.S.C. 322 [the second section of the Wunderlich Act], no finality can attach to questions of law underlying agency disputes decisions." (Govt. Br. 40, n. 21) Our brief contains no such concession.

We defined finality against the Government in terms coextensive with the coverage of the standard disputes clause. Section 322, we said, was intended as a statutory restriction to bar the contracting agencies from extending their use of the disputes clause principle (and the historical concept of finality against the Government associated therewith) to matters other than disputed facts *and* the legal questions posed upon the resolution of such facts. (Pet. Br. 47, 48). We said:

... where a legal question arises out of facts initially resolved under the disputes clause—the so-called mixed questions of fact and law that are posed by facts arising under the contract—this type of law question would fall beyond the reach of the GAO. (Footnote omitted) (Pet. Br. 48).

We think the point should have been obvious to the Government that, when we defined finality on questions of law underlying agency disputes decisions in terms of the GAO we were, at the same time, defining finality on such questions against the Government as a whole. It goes to the point repeatedly stated in this reply: throughout the legislative hearings the Government's interest in adverse disputes decisions was identified as operating through the GAO. When the GAO was taken out of the bill, it left the executive agencies free to decide their own contract disputes without the hindrance of second-guessing by the GAO and it left the contractors free to challenge adverse agency determinations in court.

IV. PETITIONER'S REPLY TO THE VIEWS OF THE GENERAL ACCOUNTING OFFICE AS STATED IN THE APPENDIX TO THE GOVERNMENT'S BRIEF.

In the committee report that accompanied the final bill that became the Wunderlich Act, it is concluded that the effect of the Act would be to leave the "GAO in precisely the same position it was in before the decision in the Wunderlich and Moorman cases." H. R. Rep. No. 1380, 83d Cong., 2d Sess. 6 (1954). It would thus seem to us that any analysis attempting to justify the lawfulness of the GAO's actions in this case would have, as its premise, a full explanation of the position held by the GAO with respect to agency contract disputes and payments prior to the *Wunderlich* and *Moorman* decisions. But neither the Government's brief nor the GAO's own views (Govt. Br. 41-50) provide this Court with such an explanation. In fact, those views offer an analysis that ends where it should begin and throughout they assume the existence of an authority in the GAO which is never proven.

Not only has the GAO not met the critical point in issue, but, we submit, it cannot meet that point. The truth of the matter is that prior to the *Wunderlich* and *Moorman* decisions, the GAO never had authority to assert control over contract matters of the sort that was exercised against Petitioner and the contracting agency in this case. Repeatedly, the Comptroller had been told through court decisions and administrative opinions that his functions as an accounting officer did not vest his office with authority to second-guess decisions of other executive officers in connection with matters specially entrusted to their judgment. See, *Miguel v. McCarl*, 291 U.S. 442 (1934); *United States v. Mason & Hanger Co.*, 260 U.S. 323 (1922); *Wright v. Ynchausti & Co.*, 272 U.S. 640 (1922); *United States v. Jones*, 59 U.S. (18 How.) 92 (1856); *McShain Co., Inc. v. United States*, 83 Ct. Cl. 405 (1936); *Albina Marine Iron Works, Inc. v. United States*, 79 Ct. Cl. 714 (1934); 37 Ops. Att'y Gen. 534, (1934); 37 Ops. Att'y Gen. 437 (1934); 37 Ops. Att'y Gen. 95 (1933); 36 Ops. Att'y Gen. 289 (1930); 34 Ops. Att'y Gen. 311 (1924); 34 Ops. Att'y Gen. 162 (1924). Nothing in the Wunderlich Act has altered this limitation on the GAO's authority, and, not until this case, has the GAO ever seriously contended to the contrary.

The only other point that requires comment is the GAO's attempt to draw a distinction between the absolute finality accorded a contracting officer's decision—as was the case, for example, in *United States v. Mason & Hanger Co.*, *supra*—and decisions rendered by contract appeal boards. According to the GAO, the difference between these respective decisions is that “contracting officers . . . are expected to represent the government's interests” whereas “Boards function as independent tribunals. . . .” (Govt. Br. 49). The dis-

inction is non-existent. Contract boards, like contracting officers, are representative agents who derive their authority from, and are beholden to, the same source: the head of the agency. As stated herein, both have the duty to use objective, independent judgment. (*supra*, at 18, 19, n. 19) But even if one were to speak with less partiality than the other in deciding a contractor's claim, that would have absolutely no bearing on the finality that attaches to the decision insofar as the GAO is concerned. Absent fraud or overreaching, the GAO is without authority to question either decision because the matter in dispute is within the exclusive province of *the agency* to decide. And this is so because it is the agency alone that has been delegated the authority to enter into contracts, hence it alone has the right to decide how, and in what manner, it shall resolve disputes arising under its contracts.

CONCLUSION

In considering this case, we ask that the Court give thought to the calamity that befell S&E Contractors. Operating within the framework of the contract forms, regulations and procedures mandated by the Government, S&E Contractors undertook a construction project in 1961 during the course of which it was compelled to furnish extra labor, materials and effort equal to twice the original contract price. It sought recompense for those outlays in accordance with the Government's own rules and it prevailed, but it has yet to receive one penny on its claims, and is out of business due to this extraordinary assertion of power by the General Accounting Office—a power which the Department of Justice now claims to be irrelevant to the issues in this case.

Neither the history of the Wunderlich Act nor considerations of public policy could support either the unauthorized actions taken by the GAO in this case or the arguments advanced by the Department of Justice. The Government is fully protected by the technical, management and legal skills within the using agency and by the adversary proceeding which it conducts and in which it participates. There is, therefore, neither reason nor need to vest the GAO with power to review agency disputes' decisions, absent fraud or over-reaching.

We urge the Court to reestablish what has heretofore been an orderly process for the resolution of contractual disputes between the Government and its contractors. The Court is asked to reverse the judgment of the Court of Claims and direct that Petitioner's Motion for Summary Judgment be granted.

Respectfully submitted,

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CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT

OCTOBER TERM, 1971

S&E CONTRACTORS, INC. v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 70-88. Argued October 21, 1971—Reargued March 20, 1972—
Decided April 24, 1972

In a contract disputes procedure, the Atomic Energy Commission (AEC) approved claims of its contractor for additional compensation. In response to an AEC certifying officer's request for advice as to one item, however, the General Accounting Office (GAO) ruled that the claims could not be certified for payment. When the AEC then refused to pay the compensation, the contractor brought suit in the Court of Claims alleging that the GAO had no authority to overturn the AEC approval. The Government, through the Department of Justice, defended on the ground that the AEC determination was not final but was subject to judicial review under the standards specified in § 321 of the so-called Wunderlich Act, "[t]hat . . . the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." The Court of Claims held that "the Government has the right to the same extent as the contractor to seek judicial review of an unfavorable administrative decision on a contract claim." *Held*:

1. The AEC, which for the purpose of this contract was the United States, had exclusive administrative authority under the disputes clause procedure to resolve the dispute here at issue, and neither the contract between the parties nor the Wunderlich Act permitted still further administrative review by the GAO. Pp.

2. The Wunderlich Act does not confer upon the Department of Justice the right to appeal from a decision of an administrative agency, nor is this a case involving a contractor's fraud, concerning which the Department has broad powers to act under several statutory provisions. Pp. 12-19.

193 Ct. Cl. 335, 433 F. 2d 1373, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., and STEWART and POWELL, JJ., joined, *post*, p. 19. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 23. REHNQUIST, J., took no part in the consideration or decision of the case.

Geoffrey Creyke, Jr., reargued the cause for petitioner. With him on the briefs was *John P. Wiese*.

Irving Jaffe reargued the cause for the United States. On the brief were *Solicitor General Griswold*, *Assistant Attorney General Gray*, *Samuel Huntington*, and *Walter H. Fleischer*.

Briefs of *amici curiae* urging reversal were filed by *Edward L. Wright*, *Beverly C. Moore*, *F. Trowbridge vom Baur*, *Overton A. Currie*, *Marshall J. Doke, Jr.*, *Gilbert A. Cuneo*, *George M. Coburn*, *Eldon H. Crowell*, and *John A. McWhorter* for the American Bar Association, and by *Harold C. Petrowitz*, *pro se*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented in this case is whether the Department of Justice may challenge the finality of a contract disputes decision made by the Atomic Energy Commission (AEC) in favor of its contractor, where the contract provides that the decision of AEC shall be "final and conclusive." Section 1 of the Wunderlich Act leaves

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open for contest a claim that "is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹

Moreover, 41 U. S. C. § 322, provides that "[n]o government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

The Department of Justice challenged the settlement made by AEC on two grounds, (1) that the decision was "not supported by substantial evidence" and (2) that it was "erroneous as a matter of law."

But the disputes clause in the contract² says that the decision of the AEC is "final and conclusive," unless

¹ The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321-322, provides: 41 U. S. C. § 321:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

41 U. S. C. § 322:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

² The contract provided:

"6. *Disputes*

"(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within

a court determines that the award is vulnerable under §§ 1 and 2 of the Act. There is no federal statute which submits disputes of this character to review by one or more administrative agencies, where as here there is no charge of fraud or bad faith. Nor is there a statute which enables another federal agency to contest in court the validity of the decision of AEC, absent fraud or bad faith.

In plain lay language the question then is whether, absent fraud or bad faith, the contractor can rely on the ruling of the federal agency with which it made the contract or can be forced to go through still another tier of federal review. We hold that absent fraud or bad faith the federal agency's settlement under the disputes clause is binding on the Government, that there is not another tier of administrative review, and that, save for fraud or bad faith, the decision of AEC is "final and conclusive," it being for these purposes the Federal Government. We reverse the judgment of the Court of Claims.

30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

"(b) This 'Disputes' Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

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I

On August 4, 1961, petitioner contracted with the Atomic Energy Commission to build a testing facility at the National Reactor Test Station in Idaho. The work was completed and accepted by the Atomic Energy Commission on June 29, 1962. Because of various changes in contract specifications and difficulties in meeting performance schedules, petitioner submitted a series of claims to the contracting officer for resolution under the standard disputes clause contained in the contract, asking for equitable modifications of the contract and additional compensation. On August 8 and November 8, 1962, the contracting officer approved some of the claims and disapproved others and the petitioner sought review of the adverse decisions with the Atomic Energy Commission.

Since it did not then have a contract appeals board,³ the Commission referred petitioner's appeal to a hearing examiner before whom an adversary hearing was held. On June 26, 1963, the examiner decided in favor of eight of petitioner's claims and remanded the dispute to the contracting officer for negotiations to determine the exact amount due petitioner. 2 A. E. C. 631. The contracting officer then sought review of this decision by the Commission. See 10 CFR § 2.760 (Jan. 1, 1963).

The Commission declined to review four of the claims, 2 A. E. C. 738, which had the effect of sustaining the examiner's decision on them. 10 CFR § 2.762 (a) (Jan. 1, 1963). Included within this group was the examiner's determination that amounts due petitioner could not be retained to offset claims allegedly owed by petitioner to

³ The Atomic Energy Commission Board of Contract Appeals was not established until 1964. See 10 CFR § 3.1 *et seq.* (Jan. 1, 1971).

other contractors and other agencies of government. The Commission modified the examiner's decision on three of the remaining claims and reversed him on the last, which petitioner has since abandoned. It "remanded to the contracting officer with instructions to proceed to final settlement or decision in accordance with the decision of the hearing examiner dated June 26, 1963, as modified by [its] order of November 14, 1963, and by [that] decision." 2 A. E. C. 850, 856.

On March 6, 1964, prior to AEC's final ruling but after it had upheld the examiner's decision on the "retainage" claim, a certifying officer of the Commission requested the opinion of the General Accounting Office on whether a voucher for the retainage claim could be certified for payment. Jurisdiction for the Comptroller General's review was purportedly founded upon 31 U. S. C. § 82d.⁴ After some 33 months of what amounted to a plenary review of the proceedings before the examiner, the Comptroller General concluded that the voucher could not be certified for payment. 46 Comp. Gen. 441. On March 27, 1967, AEC wrote petitioner, saying, "The Atomic Energy Commission's view is that S&E Contractors, Inc. has exhausted its administrative recourse to the Commission. The Commission will take no action, in connection with the claims, inconsistent with the views expressed by the Comptroller General" The petitioner then brought this action in the Court of Claims seeking a judgment of \$1.95 million and an order remanding the

⁴ 55 Stat. 876, 31 U. S. C. § 82d:

"The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification."

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case for negotiations on the time extension to which it claimed it was entitled under the AEC's original decision.

The defenses tendered raised no issue of any fraud or bad faith of the contractor against the United States.

On cross-motions for summary judgment, a commissioner of the Court of Claims ruled in favor of petitioner, holding that the General Accounting Office lacked authority to review the decision of AEC and that AEC's refusal to follow its own decisions favorable to petitioner was a breach of the disputes clause of the contract. On review by the Court of Claims, however, that decision was reversed by a four-to-three vote. While the majority acknowledged "that the Comptroller General effectively stopped payment of the claims," it did not pass upon the legality of that action. 193 Ct. Cl. 335, 340, 483 F. 2d 1373, 1375. Reasoning instead that the Wunderlich Act allowed both the Department of Justice and contractors an equal right to judicial review of administrative decisions and that the Atomic Energy Commission's refusal to abide by its earlier decision was a permissible means of obtaining this review, it remanded petitioner's claims "to the commissioner for his consideration and report on the various claims under Wunderlich Act standards." *Id.*, at 351, 433 F. 2d, at 1381.

The Commissioner did not base his opinion on any issue of fraud or bad faith of the contractor against the United States, nor did the Court of Claims. The case is now here on a petition for writ of certiorari which we granted. 402 U. S. 971.

Petitioner argues that neither the text nor the legislative history of the Wunderlich Act supports the right of the United States to seek judicial review of an administrative decision on a contractual dispute, that the General Accounting Office was without statutory or contractual authority to overturn AEC's decision, and that AEC should not be allowed to abandon after some 33 months

its own decision that had been made in petitioner's favor. In response, the Solicitor General contends that the Wunderlich Act does give the Department of Justice the right of judicial review of contract decisions made by federal administrative agencies and that the Department of Justice is free to assert whatever defenses it desires in the Court of Claims without regard to the earlier actions of the federal contracting agency.

II

The disputes clause included in Government contracts is intended, absent fraud or bad faith, to provide a quick and efficient administrative remedy and to avoid "vexatious and expensive and, to the contractor oftentimes, ruinous litigation." *Kihlberg v. United States*, 97 U. S. 398, 401 (1878). The contractor has ceded his right to seek immediate judicial redress for his grievances and has contractually bound himself to "proceed diligently with the performance of the contract" during the disputes process. The purpose of avoiding "vexatious litigation" would not be served, however, by substituting the action of officials acting in derogation of the contract.⁵

The result in some cases might be sheer disaster. In the present case nearly a decade has passed since petitioner completed the performance of a contract under which the only agency empowered to act determined that it was entitled to payment. To postpone payment for such a period is to sanction precisely the sort of "vexatious litigation" which the disputes process was designed to avoid.

⁵ The American Bar Association, as *amicus curiae*, notes "that the contractor's consent to permit a specific representative of the Government to decide disputes—the Commission—should not be read as permitting any different representative of the Government to 'veto' decisions rendered by the Commission which are in favor of the contractor."

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Here, petitioner contracted with the United States acting through the Atomic Energy Commission and it was exclusively with this Commission that the administrative resolution of disputes rested. Disputes initially were to be resolved between the contractor and the contracting officer and, if a settlement satisfactory to the contractor could be reached at that level, no review would lie.⁶ See *United States v. Mason & Hanger Co.*, 260 U. S. 323; *United States v. Corliss Steam-Engine Co.*, 91 U. S. 321.

By the disputes clause⁷ the decision of AEC is "final and conclusive" unless "a court of competent jurisdiction" decides otherwise for the enumerated reasons. Neither the Wunderlich Act nor the disputes clause empowers any other administrative agency to have a veto of AEC's "final" decision or authority to review it. Nor does any other Act of Congress, except where fraud or bad faith is involved, give any other part of the Executive Branch authority to submit the matter to any court for determination. In other words, we cannot infer that by some legerdemain the disputes clause submitted the dispute to further administrative challenge or approval,⁸ and did not mean what it says when it made

⁶ While the quoted language from paragraph 6 (a) of the contract concerns factual disputes and while questions of law are dealt with in paragraph 6 (b) (see n. 2, *supra*), there is no reason to believe that the two clauses should not be considered *in pari materia* or that a different avenue for review should apply to legal questions than to those of fact. Indeed, paragraph 6 (b) speaks of "consideration of law questions in connection with decisions provided for in paragraph (a)." (Emphasis added.) The difference between the two clauses relates only to the standard of reviewability and does not establish separate avenues of review.

⁷ See n. 2, *supra*.

⁸ For certain types of fraud against the Government, Congress has vested the General Accounting Office with investigative powers. In the case of kickbacks by Government contractors, for example,

AEC's decision "final and conclusive." See *United States v. Mason & Hanger Co.*, *supra*, at 326. Kipps, *The Right of the Government to Have Judicial Review of a Board of Contract Appeals Decision Made Under the Disputes Clause*, 2 Pub. Contract L. J. 286 (1969); Schultz, *Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 Law & Contemp. Prob. 115, 132-133 (1964).

A citizen has the right to expect fair dealing from his government, see *Vitarelli v. Seaton*, 359 U. S. 535, and this entails in the present context treating the government as a unit rather than as an amalgam of separate entities. Here, the AEC spoke for the United States and its decision, absent fraud or bad faith, should be honored. Cf. *NLRB v. Nash-Finch Co.*, 404 U. S. 138.

Since the AEC withheld payment solely because of the views of the Comptroller General and since he had been given no authority to function as another tier of administrative review, there was no valid reason for AEC not to settle with petitioner according to its earlier decision. For that purpose the AEC was the United States. Cf. *Small Business Administration v. McClellan*, 364 U. S. 446, 449.

The cases deny review by the Comptroller General of administrative disputes clause decisions as "without legal authority" absent fraud or overreaching. *E. g.*, *McShain Co. v. United States*, 83 Ct. Cl. 405, 409 (1936). In

"the General Accounting Office shall have the power to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a negotiated contract," 74 Stat. 741, 41 U. S. C. § 53, and criminal penalties are provided if a violation is established. 41 U. S. C. § 54.

If the Comptroller General has the broad, roving investigatory powers that are asserted, specific statutory grants of authority such as this provision relating to kickbacks would be superfluous.

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James Graham Mfg. Co. v. United States, 91 F. Supp. 715 (ND Cal. 1950), for example, the contracting agency had determined that the contractor was entitled to reimbursement for certain expenditures under two cost-plus-fee contracts, but the Comptroller General refused payment. While the court noted the "extensive and broad" powers of the Comptroller General, it held that absent instances of "fraud or overreaching" where the Comptroller General's power was founded upon specific statutory provisions such as 41 U. S. C. § 53, he had no "authority to determine the propriety of contract payments" approved by the contracting agency. 91 F. Supp., at 716. Accordingly, summary judgment was entered by the court, which said, "Since the Navy Department has determined that plaintiff contractor is entitled to the payment sought, this Court must adjudge accordingly." *Id.*, at 717.

Congress contemplated giving the General Accounting Office such powers and, indeed, the Senate twice passed—in the form of the McCarran bill—a provision which would have allowed the Comptroller to review disputes decisions to determine if they were "fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence." S. 24, 83d Cong., 1st Sess. (1953). "If enacted, it would [have] invest[ed] the GAO with the power—which it has never had—to upset an administrative decision which it [found] 'grossly erroneous' or 'not supported by reliable, probative, and substantial evidence.'" Schultz, Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle over the Wunderlich Case, 67 Harv. L. Rev. 217, 243 (1953). The House of Representatives rejected this provision, however, and the Wunderlich Act was ultimately passed in its present form. We cannot therefore construe

it to give the Comptroller General powers which Congress has plainly denied.

It is suggested, however, that the Comptroller General's power is not one of review over the AEC decision but is merely the power "to force the contractor to bring suit and thus to obtain judicial review for the Government." The disputes clause, however, sets forth the administrative means for resolving contractual disputes. Under the present contract AEC is the final administrative arbiter of such claims and nowhere is there a provision for oversight by the Comptroller General. The Comptroller General, however, conducted a 33-month *de novo* review of the AEC proceedings; it blocked the payment to which the AEC determined petitioner was entitled; and it placed upon petitioner the burden of going to the Court of Claims to receive that payment. That action by the Comptroller General was a form of additional administrative oversight foreclosed by the disputes clause.

III

A majority of the Court of Claims held "that the Government has the right to the same extent as the contractor to seek judicial review of an unfavorable administrative decision on a contract claim." 193 Ct. Cl., at 346, 433 F. 2d, at 1378. The Solicitor General adopts this view and sees in the Attorney General's obligation to conduct litigation on behalf of the United States, 28 U. S. C. §§ 516, 519, the power to overturn decisions of coordinate offices of the Executive Department.

The Attorney General has the duty to "conduct . . . litigation in which the United States, an agency, or officer thereof is a party," 28 U. S. C. § 516, and to "supervise all [such] litigation," 28 U. S. C. § 519. That power is pervasive but it does not appear how under the Wunderlich Act it gives the Department of Justice the right to appeal from a decision of the Atomic

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Energy Commission. Normally, where the responsibility for rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision and not to repudiate it. See 39 Op. Atty. Gen. 67, 68 (1937); 38 Op. Atty. Gen. 149, 150 (1934); 25 Op. Atty. Gen. 524, 529 (1905); 25 Op. Atty. Gen. 93, 96 (1903); 20 Op. Atty. Gen. 711, 713 (1894); 20 Op. Atty. Gen. 270, 272 (1891); 17 Op. Atty. Gen. 332, 333 (1882). Indeed, this view of the role of the Department of Justice may be traced back to William Wirt, the first of our Attorneys General to keep detailed records of his tenure in office. "Wirt it was who first recorded the propositions that the Attorney General does not decide questions of fact, that the Attorney General does not sit as an arbitrator in disputes between the government departments and private individuals nor as a reviewing officer to hear appeals from the decisions of public officers" H. Cummings & C. McFarland, *Federal Justice* 84 (1937) (footnotes omitted).

The power to appeal to the Court of Claims a decision of the federal agency under a disputes clause in a contract which the agency is authorized to make is not to be found in the Wunderlich Act and its underlying legislative history.⁹ That Act was designed to overturn our

⁹ It has been said that the Act's legislative history "has something for everyone." Kipps, *The Right of the Government to Have Judicial Review of a Board of Contract Appeals Decision Made Under the Disputes Clause*, 2 Pub. Contract L. J. 286, 295 (1969). Suffice it to say we find the Act's history at best ambiguous. In construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws. See generally *NLRB v. Fruit Packers*, 377 U. S. 58, 66 (1964); *Mastro Plastics Corp. v. NLRB*, 350 U. S. 270, 288 (1956); *Schwepman Bros. v. Calvert Corp.*, 341 U. S. 384, 394-395 (1951); *United States v. St. Paul, M. & M. R. Co.*, 247 U. S. 310, 318 (1918); *Omaha*

decision in *United States v. Wunderlich*, 342 U. S. 98 (1951), which had closed the courthouse doors to certain citizens aggrieved by administrative action amounting to something less than fraud. See S. Rep. No. 32, 83d Cong., 1st Sess.; H. R. Rep. No. 1380, 83d Cong., 2d Sess. It should not be construed to require a citizen to perform the Herculean task of beheading the Hydra in order to obtain justice from his Government.

We are reluctant to construe a statute enacted to free citizens from a form of administrative tyranny so as to subject them to additional bureaucratic oversight, where there is no evidence of fraud or overreaching. In this connection, it should be noted that committee reports accompanying the Wunderlich Act indicate that judicial review was provided so that contractors would not inflate their bids to take into account the uncertainties of administrative action.¹⁰ This objective would be ill-served

& *Council Bluffs Street R. Co. v. ICC*, 230 U. S. 324, 333 (1913); *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 318 (1897).

The reason is the *caveat* of Mr. Justice Holmes, "We do not inquire what the legislature meant; we ask only what the statute means." *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419.

¹⁰ The House Report stated, "A continuation of this situation [created by the *Wunderlich* decision] will render the performance of Government work less attractive to the responsible industries upon whom the Government must rely for the performance of such work, and will adversely affect the free and competitive nature of such work. It will discourage the more responsible element of every industry from engaging in Government work and will attract more speculative elements whose bids will contain contingent allowances intended to protect them from unconscionable decisions of Government officials rendered during the performance of their contracts." H. R. Rep. No. 1380, 83d Cong., 2d Sess., 4.

In a similar vein, the Senate Report on the Senate version of the Wunderlich Act stated, "The impact of this decision on the many business firms who, in a condition of expanding production with respect to the defense of the United States, must deal with many

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if Government contractors—having won a favorable decision before the agencies with whom they contracted—had also to run the gantlet of the General Accounting Office and the Department of Justice.

IV

A contractor's fraud is of course a wholly different genus than the case now before us. Even where the contractor has obtained a judgment and the time for review of it has expired, fraud on an administrative agency or on the court enforcing the agency action is ground for setting aside the judgment. "[S]etting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it," *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238, 245, are the usual forms of relief which have been granted. Patents obtained with unclean hands and contracts that are based on those patents are similarly tainted and will not be enforced. *Precision Co. v. Automotive Co.*, 324 U. S. 806. Contracts with the United States—like patents—are matters concerning far more than the interest of the adverse parties; they entail the public interest:

"[W]here a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public." *Id.*, at 815.

of the Government departments in Government construction and defense materials, was one that could only cause great expense to the United States in that the contractors would be forced to puff up their bids so as to be sure of sufficient funds to provide for unforeseen contingencies." S. Rep. No. 32, 83d Cong., 1st Sess., 2.

Congress has made elaborate provisions for dealing with fraudulent claims of contractors. Where the Comptroller General is convinced "that any settlement was induced by fraud," he is directed to "certify . . . all the facts . . . to the Department of Justice, to the Administrator of General Services, and to the contracting agency concerned." 58 Stat. 664, as amended, 41 U. S. C. § 116 (b). The Administrator of General Services is also given broad powers of investigation and he is directed to give the Department of Justice "any information received by him indicating any fraudulent practices, for appropriate action." 41 U. S. C. § 118 (d). Moreover, whenever "any contracting agency or the Administrator of General Services believes that any settlement was induced by fraud," the facts shall be reported to the Department of Justice. 41 U. S. C. § 118 (e). And the Department of Justice is given broad powers to act. *Ibid.* In addition, Congress has imposed severe penalties on contractors who commit fraudulent acts and it has given the federal courts power to hear and determine such cases. 41 U. S. C. § 119.

Broad, flexible civil remedies are also provided against those who "use or engage in . . . an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property" 63 Stat. 392, 40 U. S. C. § 489 (b).

As to the Court of Claims, 28 U. S. C. § 2514 provides that: "A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

Opinion of the Court

"In such cases the Court of Claims shall specifically find such fraud or attempt and render judgment of forfeiture."¹¹

These statutory provisions show that, apart from the inherent power of courts to deal with fraud, the Department of Justice indubitably has standing to appear or intervene at any time in any appropriate court to restrain enforcement of contracts with the United States based on fraud. See, e. g., *United States v. Hougham*, 364 U. S. 310 (1960); *Rex Trailer Co. v. United States*, 350 U. S. 148 (1956); *United States v. Dinerstein*, 362 F. 2d 852 (CA2 1966).

So far as the Wunderlich Act is concerned, it is irrelevant whether the administrative agency deciding this dispute is the AEC or AEC's board of contract appeals. It was common in the beginning to give final authority to the resolution of disputes under a Government contract to the designated contractual officer, save for "fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment." *Kihlberg v. United States*, 97 U. S., at 402. Later came the present boards of contract appeals.

Boards of contract appeals within the respective agencies today are common. They are not statutory creations but are established by administrative regulations. S. Doc. No. 99, 89th Cong., 2d Sess., Operation and Effectiveness of Government Boards of Contract Appeals 20-21. Their decisions "constitute administrative

¹¹ Where the Department of Justice has successfully asserted this defense of fraud, the Court of Claims has disallowed contractors' claims. See, e. g., *Kamen Soap Products Co. v. United States*, 129 Ct. Cl. 619, 124 F. Supp. 608 (1954) (fraudulent preparation of evidence); *Morris Demolition Corp. v. United States*, 99 Ct. Cl. 336 (1943); *Jerman v. United States*, 96 Ct. Cl. 540 (1942) (fraudulent invoices); *Mervin Contracting Corp. v. United States*, 94 Ct. Cl. 81 (1941) (false payroll vouchers); *Atlantic Contracting Co. v. United States*, 57 Ct. Cl. 185 (1922) (embezzlement).

adjudication in its purest sense.” *Id.*, at 21. As noted,¹² AEC has had a board of contract appeals since 1964. , Boards of contract appeals were in effect long before the Wunderlich Act and that explains why the Act provides for review “of any decision of the head of any department or agency or *his duly authorized representative or board.*” 41 U. S. C. § 321 (emphasis added).

We held in *United States v. Bianchi & Co.*, 373 U. S. 709, that even where the decision on review in the Court of Claims is that of a board of contract appeals, the review must be on the administrative record and that no trial *de novo* may be held. That decision led to proposals in Congress that, in effect, rulings of contract appeals boards be denied finality.¹³ S. Doc. No. 99, *supra*, at 25-26 and n. 70. But Congress has not taken that step. Some have urged that where a decision of a board of contract appeals is involved, the United States should have standing to appeal to the Court of Claims. *Id.*, at 159. But our leading authority on these problems, Professor Harold C. Petrowitz, who wrote S. Doc. No. 99, *supra*, observed, “This has never been done, and the procedure may appear anomalous in view of the relatively close relationship between boards and the agencies they serve.” *Ibid.* However serious the problem may be and whatever its dimensions, it is obviously one for the Congress to resolve, not for us to resolve within the limits of the Wunderlich Act.

This case does not involve the situation where an administrative agency, upon timely petition for rehearing or prompt *sua sponte* reconsideration, determines that its earlier decision was wrong and, for that reason, refuses

¹² See n. 3, *supra*. And see 29 Fed. Reg. 12829 *et seq.*

¹³ For other aspects of exhaustion of administrative review of decisions from boards of contract appeals, see *United States v. Moorman*, 338 U. S. 457; *United States v. Grace & Sons*, 384 U. S. 424; *United States v. Utah Construction Co.*, 384 U. S. 394.

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to abide by it. AEC has not, to this day, repudiated the merits of its decisions in favor of petitioner. Nor, to repeat, is this a case of a fraud of a contractor against the United States. This is simply an instance where a citizen successfully resolved its disputes with the agency with which it had contracted and to whom that power had been delegated. The fruits of petitioner's labors were frustrated, however, by the intermeddling of another agency without power to act and, when petitioner sought enforcement of its rights in court, still another agency of the Government entered and sought to disavow the decision made here by the AEC.

If the General Accounting Office or the Department of Justice is to be an ombudsman reviewing each and every decision rendered by the coordinate branches of the Government, that mandate should come from Congress, not from this Court.

The judgment of the Court of Claims is

Reversed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL join, concurring.

Because I agree that in this case, where neither fraud nor bad faith is charged, the Wunderlich Act, 41 U. S. C. §§ 321-322, does not operate to give the United States the power to challenge a contract disputes clause finding of fact in favor of the contractor by the Government's own contracting agency, I join the Court's opinion and its judgment. I venture some supportive comments:

1. The contracting officer and the Atomic Energy Commission acted here in an executive capacity for the United

States. See *Small Business Administration v. McClellan*, 364 U. S. 446, 448-450 (1960). The Commission is the party to the contract with the contractor. Its exercise of executive judgment is necessarily that of the United States. Yet the Government, by its position here, would grant itself the right to challenge its own executive determination whenever the General Accounting Office, by interposition, thinks this should be done. This, for me, does not make good sense and, in the absence of clear congressional authorization, I doubt that it would make good law.

2. The disputes clause in Government contracts has been employed for over four decades. The clause is one drawn and prescribed by the United States. It is not one drawn by the contractor or by any group of contractors with whom the United States deals. And for years, with the specified exceptions, that clause itself has been regarded as conferring no right of judicial review on the part of the Government.

3. By accepting the disputes clause in his contract, the contractor bears the interim financial burden and gives up the right of rescission and the right to sue for damages. What he receives in return is the Government's assurances of speedy settlement and of prompt payment, not payment delayed for months or, as here, for years.

4. To compel a contractor to go through the administrative process and to proceed and to perform with less than his usual arsenal of defenses against administrative arbitrariness or unfairness, and then to have that determination submitted to judicial review at the behest of still another agency of Government, subjects the contractor to untoward delay in payment and to a financial hazard that may well prove to be ruinous.

5. The result would be a strange one if, as even the GAO here concedes, a contracting officer's decision favorable to a contractor possesses finality, *United States v. Corliss*

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Steam-Engine Co., 91 U. S. 321 (1876); *United States v. Mason & Hanger Co.*, 260 U. S. 323 (1922), while a decision at the higher level of the agency itself does not. When the officer and the contractor agree to the disposition of a dispute, there is no occasion for the issuance of a decision by the contracting officer, and the Wunderlich Act, by its terms, does not apply. And if the contractor accepts a decision of the contracting officer, and does not appeal to the Commission, that decision, by the specific provisions of the disputes clause, is final and conclusive as to questions of fact. Under the Government's position, however, the decision at the agency head would enjoy no such preferred and conclusive status.*

6. Lurking in the background of the Court's decision is advantage to the Government resulting from what strikes me as a possible breach of contract. The contractor here, according to the long-term understanding of the disputes clause, consented to the disposition of disputes by the contracting officer and by the AEC on appeal, and to the finality of decision at those points. It did not

*Judge Collins, dissenting in the Court of Claims, says it well:

"When a dispute arises between a contractor and the Government, the 'disputes' clause sets out clearly the procedure to be followed. First, the parties may voluntarily settle the dispute. If they do, that is the end of the matter. If no settlement is reached, the disputed matters are decided by the agency's contracting officer. If the contractor does not appeal to the agency from the contracting officer's decision within the prescribed time, that, again, is the end of the matter. If, however, the contractor does appeal to the agency, then, according to the court, a decision rendered by the agency or its board favorable to the contractor is not the end of the matter; the agency is free at any time to disavow or repudiate its own decision, thereby forcing the contractor to sue. The anomaly created by the court's decision is too obvious to need elaboration. While an agency will still be bound by the decisions of its contracting officers, it will not be bound by decisions made at the highest level." 193 Ct. Cl. 335, 379-380, 433 F. 2d 1373, 1397-1398. (Footnotes omitted.)

consent to its review or to the exercise of veto power by any other agency of Government. When the United States then disavows the Commission's decision—a decision that, as the Court notes, to this day has never been withdrawn or repudiated by the AEC—it seems to me that the Government imposes something to which the contractor has not agreed.

7. The legislative history, which the dissent finds so clearly supportive of its conclusion, is not at all that clear for me. I doubt if anyone who reads and absorbs the Appendix to the dissent's opinion will find it clear and indicative. I regard it, as does the Court and as did the dissenters in the Court of Claims, as decidedly ambiguous at best. Even the Court of Claims majority struggled with the history and conceded that it did not "explicitly" provide for Government-instituted judicial review. 193 Ct. Cl. 335, 342, 433 F. 2d 1373, 1376. This is not surprising, for the Wunderlich Act was intended to relieve contractors from the holding in *United States v. Wunderlich*, 342 U. S. 98 (1951), where the Court restricted contractor-instigated judicial review to the situation of alleged and proved fraud. In *Wunderlich* the Government sought to reinstate an Interior Secretary's fact decision, favorable to the Government and adverse to the contractor, which the Court of Claims had set aside as "arbitrary," "capricious," and "grossly erroneous." The Government there urged—and prevailed over three dissenting votes—a narrow judicial review standard for the contractor. Congress reacted, and the Wunderlich Act overrode this restrictive measure of review and opened the door to the contractor to the extent permitted by the proviso clause of § 321.

I am not able to read into this legislative change a corresponding nod in the direction of the Government. The flat rejection by Congress of the proposed provision for GAO review is significant. There would be no point

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
in that rejection if GAO has the power to defeat the finality of the disputes decision anyway. And the differing approaches taken on this appeal by the Department of Justice and the GAO themselves indicate the inconclusiveness of the legislative history.

8. The issue is not whether advantage is or is not to be taken of the Government. Of course, the Government's rights are to be protected. That protection, however, is afforded by the nature and workings of the contract disputes system, by its emphasis on expeditious performance and getting the job done, and by the presence of the contracting officer and the agency, but not of the GAO. This results in fulfillment of the contract and, at the same time, gives the contractor the protection he needs against fraud, capriciousness, arbitrariness, bad faith, and absence of evidence. In the exercise of its legislative judgment, Congress has determined that in this area the Government needs no more.

I therefore join in reversing the judgment of the Court of Claims and in giving this contractor the benefit of the decision made by the Atomic Energy Commission itself, the very agency that was the contractor's opposite party to the contract.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

This is a suit by petitioner against the United States to recover on a contract between petitioner and the Atomic Energy Commission. The contract included a "disputes clause," which provided that the Commission would decide any factual disputes that arose under the contract and that its decision would "be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."



The disputes clause also provided that while it did "not preclude consideration of law questions in connection with [disputes] decisions," it was not to "be construed as making final the [Commission's] decision . . . on a question of law." Disputes arose during performance of the contract, and the Commission decided them in petitioner's favor. The General Accounting Office, however, when rendering an advance opinion requested on behalf of the Commission as to one of the disputed items, disagreed with the Commission's decision, and for that reason the Commission refused to pay. In petitioner's subsequent suit in the Court of Claims, petitioner relied upon the Commission's decision as a "final and conclusive" resolution of the disputes, entitling petitioner to summary judgment. The Department of Justice defended the suit on the grounds that the Commission's decision was not supported by substantial evidence and was erroneous on questions of law. The issue before us is whether the Government, through the Department of Justice, may assert those defenses.

It may be helpful at the outset to put this case in perspective by reviewing briefly the law developed over the past century to regulate the enforcement of disputes clauses in Government procurement contracts. Until 1954, with the passage of the Wunderlich Act, disputes clauses provided that the decision of a designated Government official upon a matter in dispute under the contract would be final and binding upon both parties. Although in terms the disputes clauses precluded judicial review of disputes decisions, this Court beginning in 1878 consistently held that the finality of a disputes decision could be challenged in court by either party on the ground of fraud or bad faith by the deciding Government official. Thus the "fraud" exception to the finality of disputes decisions was not written into disputes clauses but was judicially fashioned.

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Under this system then, a contractor dissatisfied with an adverse disputes decision could contest the finality of that decision only by proving in court that it was fraudulent. The Government, of course, bore an identical burden when it contested the finality of a disputes decision in favor of the contractor. That situation arose when GAO, congressional watchdog of Government expenditures, refused to sanction payment to a contractor of the amount found due under a disputes decision in his favor and thereby forced him to bring suit. GAO's view of the disputes decision, however, was of no consequence in court; indeed, whether or not the Government defended the contractor's suit was a matter solely for the judgment of the Government's lawyer, the Department of Justice. Once in court, the contractor relied upon the finality of the disputes decision and recovered on that basis unless the Government proved that the decision was fraudulent.

Over the years, the Court of Claims gradually broadened the fraud exception to the finality of disputes decisions. In 1951, however, this Court stopped the trend by holding that a disputes decision, rendered pursuant to a disputes clause purporting to make that decision final, was conclusive upon both parties unless the challenger proved in court that the deciding Government official was guilty of "conscious wrongdoing," an intention to cheat or be dishonest." *United States v. Wunderlich*, 342 U. S. 98, 100 (1951). *Wunderlich's* narrow definition of the fraud exception alarmed the Government as well as contractors, for, in practical effect, it meant that disputes decisions were virtually invulnerable to challenge.

The result of this concern was the so-called Wunderlich Act, drafted by GAO and supported by GAO, Government procurement agencies, and contractors. The Act overruled *Wunderlich* by directing that no disputes clause, purporting to make disputes decisions final, "shall

be pleaded in any suit . . . as limiting judicial review of any [disputes] decision to cases where fraud by [the Government] official . . . is alleged." The Act did more than simply overrule *Wunderlich*, however, for it also explicitly stated the grounds upon which courts could set aside disputes decisions: "any [disputes] decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." Finally, the Act provided that "[n]o Government contract shall contain a provision making final on a question of law the decision of any [Government] official"

The Wunderlich Act, then, rendered the old forms of disputes clauses unserviceable, for no longer could the parties bind themselves to the finality of a disputes decision, judicially reviewable only if the challenger proved that it was fraudulent. Consequently, the disputes clause in the contract before us did not even attempt to provide for the finality of the Commission's disputes decisions, but instead expressly tracked the language of the Act. Under this disputes clause and the Act, the party dissatisfied with a disputes decision is no longer limited to challenging the finality of that decision only on the ground that it was "fraudulent," for the dissatisfied party is now entitled also to prove in court that the decision was "capricious," "arbitrary," "so grossly erroneous as necessarily to imply bad faith," "not supported by substantial evidence," or incorrect "on a question of law." In this case, the Government relied upon the last two grounds to challenge the finality of the Commission's disputes decision in favor of petitioner.¹

¹ The concurring opinion seems to read the judicial-review provision out of the disputes clause: "And if the contractor accepts a decision of the contracting officer, and does not appeal to the Commission, that decision, by the *specific provisions* of the dis-

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As noted above, under pre-Wunderlich Act disputes clauses, which purported to make disputes decisions final, the Government, like the contractor, could avail itself of the judicially created fraud exception to the finality of disputes decisions. The Government obtained judicial review when GAO refused to sanction payment after a disputes decision in favor of the contractor, thus forcing him to bring a suit in which the Department of Justice represented the Government. That was precisely the path followed in this case, for GAO, in response to a request for an advisory opinion, informed the Commission that payment would be improper because the disputes decision did not meet the standards of the Wunderlich Act, and, in petitioner's subsequent suit, the Department of Justice represented the Government. Had this case arisen under earlier forms of disputes clauses, which purported to make disputes decisions final, and before the Wunderlich Act, the Government could have defended the suit only on the judicially created ground that the disputes decision was fraudulent. Under the current clause and the Act,

putes clause, is final and conclusive as to questions of fact. Under the Government's position, however, the decision at the agency head would enjoy no such preferred and conclusive status." *Ante*, at 21 (emphasis added). The Commission's disputes decision does not have "conclusive status" under the disputes clause, of course, because of a "specific provision" of the clause. That provision directs that the Commission's decision is "final and conclusive *unless*" (emphasis added) a court determines that it was "fraudulent," etc. It does *not* direct that the Commission's decision is final and conclusive unless the *contractor appeals* to the courts. That is the language of the earlier provision, referred to by the concurring opinion, under which the contracting officer's decision is final and conclusive unless the *contractor appeals* to the Commission. If "the specific provisions of the disputes clause" apply after the contracting officer's decision, surely they also apply after the Commission's decision.

however, the Government is not limited to that narrow ground. Like the contractor, the Government may now also rely upon any or all of the other grounds enumerated in the clause and the Act. The Commission's disputes decision is not "final and conclusive," under the clause and the Act, if the Court of Claims determines, as the Government asserted here, that the decision was "not supported by substantial evidence" or was incorrect "on a question of law."²

Yet the Court today holds that the Government has no right to defend petitioner's suit. Had the Commission's disputes decision been adverse to petitioner; of course, petitioner would have been free to challenge its finality in court, under the disputes clause and the Act, on the grounds that it was "not supported by substantial evidence" and was incorrect "on a question of law." The Court holds, however, that the Government may not challenge the finality of the disputes decision in favor of petitioner because the Government, under the disputes clause and the Act, has no right to judicial review of disputes decisions.³ The Court reaches this

² The Court's opening sentence appears to say that we are dealing with a pre-Wunderlich Act disputes clause that "provides that the decision of AEC shall be 'final and conclusive.'" *Ante*, at 2. The Court later recognizes the obvious: "By the Disputes Clause the decision of AEC is 'final and conclusive' unless 'a court of competent jurisdiction' decides otherwise for the enumerated reasons." *Id.*, at 9.

³ It was suggested at oral argument that the procurement agency might pay the contractor in accordance with a disputes decision in his favor and that subsequently, prompted by GAO's post-audit, the Department of Justice might sue the contractor to recoup the payment on the ground that the agency's decision was improper under the disputes clause and the Wunderlich Act. The Court's holding today, of course, prohibits the Government from obtaining judicial review of disputes decisions by that method. Indeed, that would be an *a fortiori* case, for the agency not only would have decided in favor of the contractor, but also would have paid him in accord-

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conclusion on the strength of its assertions that GAO had no business exercising its statutory authority and advising the Commission that the disputes decision was erroneous, that the Department of Justice had no business exercising its statutory authority and appearing in the Court of Claims to defend petitioner's suit, and that the Government is always entitled to relief if the contractor perpetrates a fraud. Noticeably absent from the Court's opinion is any justification for interpreting the disputes clause and the Act to apply only when a disputes decision is adverse to the contractor. Somehow the Court construes a contract and a statute that bar finality for *all* disputes decisions to require finality for disputes decisions in favor of contractors.

Today's decision is demonstrably wrong. The Court holds that Congress enacted the Wunderlich Act for the benefit of contractors, to arm them with grounds in addition to fraud to challenge in court the finality of disputes decisions unfavorable to them. Yet, without an iota of support in the language of the Act, which expressly governs "any" disputes decision in "any suit," or in the Act's legislative history, which confirms that the expanded grounds of judicial review were to be available to both the Government and contractors, the Court holds that the Government, unlike contractors, may not rely upon the Act to challenge in court the finality of disputes decisions. Indeed, the Court goes further, for, as noted, the disputes clause before us did not purport to make the Commission's disputes decisions final. The Court thus holds that the Act denies the Government the privilege of entering into a contract that affords it as well as the contractor the right to judicial review of disputes decisions. Hence, while the

ance with its decision. If a disputes decision is final when the agency refuses to implement it by payment, certainly it is final when the agency pays.

Act ensures that contractors are entitled to judicial review even when the disputes clause provides for finality, the Act also, according to the Court, ensures that the Government is denied judicial review even when the disputes clause does not provide for finality. Today's decision produces the absurd result that when the Government agreed to a disputes clause with no provision for judicial review, it could nevertheless challenge the finality of a disputes decision at least for fraud, but now that the Government has agreed to a disputes clause specifying five grounds of judicial review, including fraud, it is entitled, holds the Court, to none at all.⁴ The Government's position is thus worse than it was before the Act, for it is deprived of even the limited review for fraud to which it was entitled under *Wunderlich*. Finally, the Act flatly prohibits disputes clauses that make disputes decisions final on questions of law. The clause before us, following the Act, expressly pro-

⁴ The Court's constant repetition of the phrase "fraud or bad faith" might suggest to the casual reader that the Court is holding that the Government may challenge the finality of disputes decisions on those grounds. That, however, is not true, for fraud and bad faith are two of the grounds specified in the disputes clause and the *Wunderlich* Act: a disputes decision may be set aside if it is "fraudulent" or if it is "so grossly erroneous as necessarily to imply bad faith." In contrast to the disputes clause and the Act, the Court is not referring to disputes decisions resulting from the fraud or bad faith of the *disputes decisionmaker*. Rather the Court is referring to fraud or bad faith on the part of the *contractor*, as the Court's statement of facts makes clear: "The defenses tendered raised no issue of any fraud or bad faith of the contractor against the United States." *Ante*, at 7. "The Commissioner did not base his opinion on any issue of fraud or bad faith of the contractor against the United States, nor did the Court of Claims." *Ibid*. See also *id.*, at 9-10, n. 8 and Part IV of the Court's opinion. The concurring opinion also refers to "fraud" and "bad faith." *Ante*, at 19. Again, however, the reference is not to fraud and bad faith as used in the disputes clause and the Act.

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vided that the Commission's disputes decisions could not be final on questions of law. Yet, in the face of the Act and the disputes clause, the Court holds that the Commission's decision is final on questions of law.

Analysis of the judicial history of disputes clauses, both in this Court and in the Court of Claims, will unfortunately unduly extend the length of this opinion. But the devastation today's decision wreaks upon Government procurement practices is sufficient justification, and Congress should be alert to the urgent need for immediate remedial legislation. Congress alone can restore the former balance between Government and contractor, for today's decision not only holds that the Act's expanded scope of judicial review is available solely for contractors, but also holds that the Act, in some unspecified way, prohibits the contracting parties from agreeing to a disputes clause that affords the Government that same scope of review. Congress must therefore make more explicit what is already explicit in the Wunderlich Act, but this time in terms so plain that even this Court will be unable to thwart the congressional will.

I

A

The contract in *Kihlberg v. United States*, 97 U. S. 398 (1878), as the Court construed it, provided that the decision of a designated Government official would be "conclusive." The official rendered a decision adverse to the contractor, and the contractor brought suit. Because there was "neither allegation nor proof of fraud or bad faith" by the official, the Court held that his decision could not "be subjected to the revisory power of the courts without doing violence to the plain words of the contract." *Id.*, at 401. The Court then enunciated the standard of judicial review that has been the

basis for the decision of every subsequent disputes clause case, both in this Court and in the Court of Claims: "in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the [contractor] *as well as upon the government.*" *Id.*, at 402 (emphasis added).

The very first case in this Court, then, laid down the rule that a decision rendered pursuant to a disputes clause was equally binding upon *both* parties; the contractor and the Government could impeach a disputes decision that the contract purported to make final, but only by proving that the decision was fraudulent. Until today, this Court never departed from the *Kihlberg* view that the same standard of judicial review is available to both parties.

Sweeney v. United States, 109 U. S. 618 (1883), reiterated the *Kihlberg* rule in another suit by a contractor dissatisfied with a disputes decision rendered by a Government official. Because "there was neither fraud, nor such gross mistake as would necessarily imply bad faith, nor any failure to exercise an honest judgment on the part of the officer," the Court held, "on the authority of *Kihlberg v. United States*," that the official's decision was conclusive. *Id.*, at 620.

The Court next decided three cases involving contracts between private parties. In *Martinsburg & Potomac R. Co. v. March*, 114 U. S. 549 (1885), a contractor agreed to do certain work for a railroad company, and the contract provided that disputes would be decided by a company official whose decision would be "final and conclusive." *Id.*, at 553. The official's decision was in favor of the company, and the contractor brought suit. The Court, stating that the "case is within the principles announced in *Kihlberg v. United States* and

Sweeney v. United States,” *id.*, at 550 (here and in subsequent similar quotations, citations not repeated), held that the official’s decision was conclusive because there was no proof that he “had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him,” *id.*, at 553.

The contract in *Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185 (1891), was essentially the same as the contract in *March*. In *Price*, however, the official’s disputes decision was in favor of the contractor. The company refused to pay in accordance with the decision, and the contractor brought suit. The Court first reviewed *March* and stressed that *March* had applied “the principles announced in *Kihlberg v. United States* and *Sweeney v. United States*.” *Id.*, at 193. The Court then pointed out that “[t]he only difference between that case [*March*] and the present one is that the alleged mistakes of the engineer in the former were favorable to the railroad company, while in this case they are favorable to the contractors.” *Id.*, at 194. “[T]hat difference,” said the Court, “cannot affect the interpretation of the contract.” *Ibid.* Because there was no proof of “fraud upon the part of the company’s engineers, or such gross mistakes by them as imply bad faith,” the Court held that the disputes decision was binding upon the company. *Id.*, at 195.

Price thus established that the party whose employee was delegated authority to make the disputes decision could also challenge the finality of that decision, although, like the contractor, only under the *Kihlberg* test of fraud. The Court reaffirmed this application of the *Kihlberg* rule in *Sheffield & Birmingham Coal, Iron & R. Co. v. Gordon*, 151 U. S. 285 (1894), holding that

"in the absence of fraud or mistake" by the company official, his decision in favor of the contractor "was conclusive upon the company." *Id.*, at 292.

United States v. Gleason, 175 U. S. 588 (1900), involved a Government official's disputes decision adverse to the contractor. The Court again affirmed the rule of *Kihlberg* and the intervening cases

"that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts." *Martinsburg & Potomac Railroad v. March*; *Chicago, Sante Fé & c. Railroad v. Price*." *Id.*, at 602.

The Court also followed the *Kihlberg* rule in *Ripley v. United States*, 223 U. S. 695, 701-702, 704 (1912), and *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387 (1916).

In *United States v. Mason & Hanger Co.*, 260 U. S. 323 (1922), the contractor was paid in accordance with a disputes decision in his favor, but the Comptroller of the Treasury disagreed with the decision and subsequently deducted the amount paid from other sums due the contractor. *Id.*, at 325. The contractor brought suit, relying upon the finality of the disputes decision. The Court's holding was direct and simple:

"We have decided that the parties to the contract can so provide and that the decision of the officer is conclusive upon the parties. *Kihlberg v. United States*; *Martinsburg & Potomac R. R. Co. v. March*;

United States v. Gleason; Ripley v. United States. This is extending the rule between private parties to the Government." *Id.*, at 326.

Mason & Hanger, then, applied the *Kihlberg* rule when the contractor in a Government contract relied upon the disputes decision by a Government official and the Government challenged it. Hence, both parties to a Government contract, like both parties to a private contract, as in *Price* and *Gordon*, were free to challenge the finality of a disputes decision, although only upon the limited grounds permissible under *Kihlberg*.

Mason & Hanger also held that "the Comptroller of the Treasury has no power" over a disputes decision, 260 U. S., at 326, meaning that his disagreement with the decision was irrelevant and had no effect in court, where the parties' rights under the contract were determined. The Government, like the contractor, could prevail only by proving that the disputes decision was fraudulent. The Comptroller's authority was limited to his power to refuse to sanction payment to the contractor, thereby forcing the contractor to bring suit for a judicial determination of his right to payment in accordance with the disputes decision in his favor.⁵

In sum, the rule first announced in *Kihlberg* in 1878 had, with *Mason & Hanger* in 1922, been held to apply to any disputes decision, whether in a Government or in a private contract, and to apply no matter which party relied upon the finality of the decision. If the Government (or, in a private contract, the party whose official decided the dispute) relied upon the finality of the decision, the contractor had to prove that it was fraudulent. *Kihlberg; Sweeney; March; Gleason.* If

⁵ The Court's citation of *Mason & Hanger*, ante, at 10, is, to say the least, perplexing.

the contractor relied upon the finality of the decision, the Government (or, in a private contract, the party whose official decided the dispute) had to prove that it was fraudulent. *Price; Gordon; Mason & Hanger*.^{*}

In *United States v. Moorman*, 338 U. S. 457 (1950), the Court once again gave extended consideration to the proper judicial interpretation of disputes clauses. The Court pointed out that "[c]ontractual provisions such as these have long been used by the Government. No congressional enactment condemns their creation or enforcement." *Id.*, at 460. The Court then reviewed *Kihlberg*, *Sweeney*, and *March*, and said that "[t]he holdings of the foregoing cases have never been departed from by this Court. They stand for the principle that parties competent to make contracts are also competent to make such agreements." *Id.*, at 461. The Court added that "[i]f parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government." *Id.*, at 462.

Finally came *United States v. Wunderlich*, 342 U. S. 98 (1951). The contract contained the usual disputes clause providing that the disputes decision was "final and conclusive." *Id.*, at 99. After noting that the

^{*} *Goltra v. Weeks*, 271 U. S. 536 (1926), which involved a contractor's challenge to the finality of a disputes decision by a Government official, also demonstrates that the rule was the same no matter which party challenged the decision. The Court there held that the official's decision was binding "unless there is an absence of good faith in the exercise of the judgment." *Id.*, at 548. Significantly, the Court cited as authority not only *Kihlberg*, *Sweeney*, *March*, and *Gleason*, all cases in which the contractor challenged and the Government (in *March*, the party whose official decided the dispute) relied upon the disputes decision, but also *Mason & Hanger*, in which the Government challenged the finality of a disputes decision upon which the contractor relied.

same disputes clause had been upheld in *Moorman*, the Court, stated:

"Contracts, both governmental and private, have been before this Court in several cases in which provisions equivalent to [this disputes clause] have been approved and enforced 'in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment' *Kihlberg v. United States*; *Sweeney v. United States*; *Martinsburg & P. R. Co. v. March*; *Chicago, S. F. & C. R. Co. v. Price*." *Id.*, at 99-100.

We thus have an unbroken line of cases in this Court, from 1878 to 1951, applying a simple, straightforward rule of judicial review. A contractual disputes clause making final a decision by an agent of one of the parties was given full effect in court, subject to the judicially created exception that allowed relief to the party challenging the decision if he was able to prove that it was fraudulent. This rule applied whether the contract was Government or private and no matter which party challenged the finality of the decision. In short, a disputes clause was *equally* binding upon both parties.

B

Most disputes clause cases, of course, have been decided not by this Court but by the Court of Claims. That court followed the *Kihlberg* rule when a contractor challenged a disputes decision against him, see, e. g., *Kennedy v. United States*, 24 Ct. Cl. 122 (1889); *P. H. McLaughlin & Co. v. United States*, 37 Ct. Cl. 150 (1902); *Pacific Hardware Co. v. United States*, 49 Ct. Cl. 327 (1914); *Brinck v. United States*, 53 Ct. Cl. 170 (1918); *Southern Shipyard Corp. v. United States*, 76 Ct. Cl. 468 (1932), as well as when the Government challenged a disputes decision in the contractor's favor.

In *Pacific Hardware, supra*, the contract provided that a Government official would deduct specified amounts from the contract price if the contractor delayed in performing the contract. Deductions were made, and the contractor brought suit. The court applied the *Kihlberg* rule and upheld the deductions. 49 Ct. Cl., at 336. The contract also provided that the official could waive deductions under certain circumstances. The contractor argued that this power violated public policy and therefore vitiated the contract. The court rejected the argument, but added that the power to decide in favor of the contractor by waiving deductions, like the power to decide against the contractor by making deductions, was subject to the *Kihlberg* rule:

"Of course, if there were fraud or such gross error as implies bad faith or a failure to exercise an honest judgment in deciding that the deductions be not made, the Government would not be bound and the contractor would remain liable." *Id.*, at 337.

In *Yale & Towne Mfg. Co. v. United States*, 58 Ct. Cl. 633 (1923), the disputes decision was in favor of the contractor, but the Government refused to pay because the Comptroller of the Treasury disagreed with the decision. The contractor argued "that the contract reposed in the contracting officer . . . the right to determine whether or not and the extent to which the contractor was entitled to extension of time, and that the finding of that officer was conclusive upon the parties in the absence of fraud or mistakes so gross as to imply bad faith." *Id.*, at 637.

The court, noting "that a long line of decisions not only by this court but by the Supreme Court requires the sustaining of the [contractor's] contention," stated:

"Provisions in Government contracts reposing in some designated official the right to determine cer-

tain questions and making his determination thereof conclusive are of frequent occurrence. Such provisions are inserted largely for the protection of the Government, and the cases in which such a determination by the designated official has been upheld by the courts have been largely cases in which the rule has been invoked in favor of the United States and against the [contractor], *but the rule is none the less effective if perchance it occasionally may operate the other way.*" *Id.*, at 638 (emphasis added).

In *Penn Bridge Co. v. United States*, 59 Ct. Cl. 892 (1924), the disputes decision was in favor of the contractor, but the Comptroller General disagreed with the decision and deducted the amount from other sums due the contractor. The Court, referring to the Comptroller's attempt to "substitute his judgment for that of the contracting officer and thereby eliminate from the case the finding of the contracting officer when the rights of the parties are in this court for adjudication," *id.*, at 898, stated that "action by the comptroller could [not] in any way conclude this court in the determination of the rights of the parties under the contract," *id.*, at 896. The court then applied the *Kihlberg* rule. *Id.*, at 897.

Penn Bridge, then, aside from reaffirming that the same rule of judicial review applied whether the Government or the contractor challenged the finality of a disputes decision, also demonstrates that GAO's view of the correctness of a disputes decision was of no effect in court. GAO's only power—the power of the purse—was to force the contractor to bring suit and thus to obtain judicial review for the Government. But once the case reached court, review was the same for both parties.

GAO's opinion of a disputes decision was irrelevant in court even when GAO favored the contractor. In

Eaton, Brown & Simpson, Inc. v. United States, 62 Ct. Cl. 668 (1926), the disputes decision was in favor of the Government, but the Comptroller General disagreed and paid the contractor. In the contractor's suit to recover on other claims, the court held that the disputes decision controlled and deducted the amount GAO had paid from other sums due the contractor. "The action of the comptroller is not conclusive upon this court in determining the rights of the parties. See *Penn Bridge Co. v. United States*." *Id.*, at 685.

In *Carroll v. United States*, 76 Ct. Cl. 103 (1932), the Comptroller General disagreed with a disputes decision in favor of the contractor and assessed damages in a sum greater than the amount due under the contract. The contractor brought suit, and the Government argued that it was entitled to the excess. The court replied:

"The issue is not a new or novel one insofar as judicial precedents are concerned. At least beginning with the case of *Kihlberg v. United States* to the present time, the Supreme Court has uniformly held that in Government contracts containing provisions similar to the one in suit, the parties are competent to bind themselves to the conclusiveness and finality of the action and findings of the department with which the contract is made, and that such action is not open to the supervisory power of the courts unless overturned by proof of fraud or such gross error as to warrant the implication of fraud." *Id.*, at 124-125.

In *Albina Marine Iron Works v. United States*, 79 Ct. Cl. 714 (1934), the disputes decision was in the contractor's favor, but the Comptroller General disagreed and assessed damages. The court held that the disputes decision

"was a final disposition of the matter. Neither

fraud nor bad faith is alleged or proven. The court cannot go behind the decision of the contracting officer where the contract makes him the final arbiter of the facts of the case unless there has been fraud or such gross error which, in effect, would imply bad faith. The cases in this court and the Supreme Court so holding are numerous." *Id.*, at 720.

After repeating that it could not review the disputes decision "without the establishment of fraud or such gross error which would imply bad faith," the court concluded:

"It is seldom that a case arises like the instant case, where the contractor is upholding the decision of the contracting officer and the Government is attempting to overthrow the decision of the officer appointed and designated by it to contract and carry out the terms of the undertaking. Unless proven to the contrary, full faith and credit should be accorded an officer of the Government in arriving at a decision which requires fair and impartial action on his part." *Id.*, at 721.

In *McShain Co. v. United States*, 83 Ct. Cl. 405 (1936), the designated Government official decided that the contractor's delay in completing the contract was unavoidable. The Comptroller General later decided that part of the delay was the contractor's fault and deducted damages from the amount due under the contract. The contractor brought suit, relying upon the finality of the disputes decision. The court said:

"Neither fraud nor bad faith is alleged or proven. This court and the Supreme Court by numerous decisions have held there is no going behind the decision of the contracting officer when the contract provides that his finding of facts therein shall be final and conclusive on the parties thereto. The action of the Comptroller General was without

legal authority. *Kihlberg v. United States; United States v. Gleason.*" *Id.*, at 409.⁷

In *B-W Construction Co. v. United States*, 97 Ct. Cl. 92 (1942), the Comptroller General deducted damages for delay after a disputes decision in the contractor's favor. The court held that because of the disputes clause "[i]t is . . . the action of the head of the department that is before us for review. On the question now before us that action is binding on us unless we find that it was arbitrary or grossly erroneous. In no event are we bound under this contract by the action of the Comptroller General." *Id.*, at 123.

In *Mitchell Canneries v. United States*, 111 Ct. Cl. 228, 77 F. Supp. 498 (1948), the Comptroller General disagreed with a disputes decision in favor of the contractor and set off that amount against other sums due the contractor on other contracts. The court applied "[t]he established principle of law that the findings of fact of a contracting officer are binding upon both the Government and the contractor if there is no fraud, gross error or arbitrariness by the contracting officer amounting to bad faith." *Id.*, at 247, 77 F. Supp., at 502.

These Court of Claims cases are further cogent authority that the Government was, until today, entitled to exactly the same judicial review as contractors. A disputes clause providing for a final decision by a Govern-

⁷ The Court cites *McShain Co.* for the proposition that "[t]he cases deny review" by GAO "absent fraud or overreaching." *Ante*, at 10. Since *McShain Co.* is simply another example of the application of the *Kihlberg* rule against the Government, I am at a loss to understand the Court's statement. As the excerpt I have quoted in the text demonstrates, *McShain Co.* did not "deny review" by GAO; rather, like the other cases, it held that GAO's view of the merits of the disputes decision was irrelevant in court and that the Government could upset the finality of that decision only by proving in court that it was fraudulent.

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ment official was equally binding upon both parties. GAO's opinion of that decision was irrelevant in court. GAO's only power was to refuse to sanction payment under a disputes decision favorable to a contractor and thereby compel the contractor to bring suit. Once in court, the standard of review applicable to contractor challenges likewise controlled the Government's challenge.

The district courts reached the identical result. In *James Graham Mfg. Co. v. United States*, 91 F. Supp. 715 (ND Cal. 1950), the Comptroller General refused to accept a disputes decision in favor of the contractor. Although the agency adhered to the merits of its decision, it refused to pay because of the Comptroller's contrary view. The court said:

"Another officer of the United States government, the Comptroller General, who has general control of the government's purse strings, has refused to sanction payment of the account which the Navy Department has approved. The question . . . is: Has he power to determine that payment shall not be made?

"The powers of the Comptroller General are extensive and broad. But he does not, absent fraud or overreaching, have authority to determine the propriety of contract payments when the contracts themselves vest the final power of determination in the contracting executive department. *United States v. Mason & Hanger Co.*; *United States v. Moorman.*" *Id.*, at 716.⁸

⁸ The Court states, *ante*, at 11, that the District Court in *James Graham*, by referring to "fraud or overreaching," referred to instances "where the Comptroller General's power was founded upon specific statutory provisions such as 41 U. S. C. § 53," a statute relating to "kickbacks by Government contractors," *id.*, at 9 n. 8. In

In *Consolidated Vultee Aircraft Corp. v. United States*, 97 F. Supp. 948 (Del. 1951), the contractor received an adverse disputes decision from the contracting officer but won reversal on appeal to the agency. GAO disagreed with the agency's decision and refused to pay, forcing the contractor to bring suit. The court held for the contractor on the authority of *Mason & Hanger*, *Penn Bridge*, and *James Graham*. *Id.*, at 951.

C

The law was thus crystal clear. The district courts, the Court of Claims, and this Court consistently applied the rule, originally announced almost a century ago in *Kihlberg*, that contractual clauses providing for the finality of disputes decisions rendered by an employee of one of the parties were enforceable in court, with the judicially created exception for fraudulent decisions. No court, nor even any contractor, ever questioned that GAO could obtain judicial review for the Government simply by refusing to approve payment on a disputes

fact, however, the District Court not only did not refer to that statute, it did not refer to any statute, nor even intimate that a statute might be relevant. What the District Court did was use the phrase "fraud or overreaching" as shorthand for the *Kihlberg* rule, the judicially created fraud exception to the finality of disputes decisions. That usage is readily apparent from a glance at the District Court's citations: *Mason & Hanger* and *Moorman* from this Court, and *Penn Bridge*, *Carroll*, and *McShain Co.* from the Court of Claims.

The Court also says, *id.*, at 11, that in *James Graham* "summary judgment was entered by the court, which said, 'Since the Navy Department has determined that plaintiff contractor is entitled to the payment sought, this Court must adjudge accordingly.'" The Court omits to quote the immediately preceding sentence in the *James Graham* opinion: "And the Navy Department's decision that these particular dues and contributions are reimbursable is *not arbitrary or unconscionable*." 91 F. Supp., at 717 (emphasis added). Thus, again, the District Court was referring to the *disputes decision*, and not, as the Court today would have it, to "fraud or overreaching" by the contractor.

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decision favorable to a contractor. It was accepted by all that the Government and the contractor both were entitled to judicial review.⁹ The problem that gave rise to the Wunderlich Act was not *who* was entitled to judicial review nor *how* judicial review was to be attained. The problem was the *scope* of judicial review.

As the Court noted in *United States v. Bianchi & Co.*, 373 U. S. 709, 713 (1963), under the *Kihlberg* rule a court's function "in matters governed by 'disputes' clauses was in effect to give an extremely limited review of the administrative decision"; the Court of Claims, however, had "somewhat expanded" the scope of judicial review "over the years." See, e. g., *Needles v. United States*, 101 Ct. Cl. 535, 601-607 (1944). It was this expansion of the scope of judicial review that *Wunderlich* addressed.

Certiorari was granted in *Wunderlich* "to clarify the rule of this Court which created an exception to the conclusiveness of such administrative decision[s]." 342 U. S., at 99. The Court gave a restrictive interpretation to this exception.

"Despite the fact that other words such as 'negligence,' 'incompetence,' 'capriciousness,' and 'arbi-

⁹ The concurring opinion asserts that "[t]he contractor here, according to the long-term understanding of the disputes clause, consented to the disposition of disputes by the contracting officer and by the AEC on appeal, and to the finality of decision at those points." *Ante*, at 21. If the concurring opinion is speaking of pre-Wunderlich Act disputes clauses, the authorities I have cited establish the utter inaccuracy of the assertion. Indeed, the concurring opinion also asserts that "for years, *with the specified exceptions*, [the disputes] clause itself has been regarded as conferring no right of judicial review on the part of the Government." *Id.*, at 20 (emphasis added). The italicized words can only refer to the judicially created exception for fraudulent decisions. The concurring opinion gives no indication that, in either of the assertions, it is referring to the current disputes clause.

trary' have been used in the course of the opinions, this Court has consistently upheld the finality of the department head's decision unless it was founded on fraud, alleged and proved. So fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract." *Id.*, at 100.

Within a month after *Wunderlich* was decided, its restrictive scope of judicial review was applied against the Government. In *Leeds & Northrup Co. v. United States*, 101 F. Supp. 999 (E.D. Pa. 1951), the contractor, after a favorable disputes decision, was reimbursed for certain costs. Several years later, GAO reviewed that decision, disagreed with it, and set off the amount already paid from sums due the contractor on another contract. The contractor was therefore compelled to bring suit. The court first pointed out that GAO's power

"is subject to the rights of parties to a contract, including the Government, to provide for some designated person or persons, even if in the employ of one of the parties, to make a final determination of any question which may arise between them. This principle has been unequivocally declared by the courts, including the Supreme Court of the United States, in many cases." *Id.*, at 1002.

After quoting extensively from *James Graham*, the court stated the rule of judicial review as follows:

"The Bureau's determinations of questions of fact under [the disputes clause] are final and conclusive in the absence of fraud. *United States v. Wunderlich*. For a court to set aside such determinations under [the disputes clause], fraud, meaning conscious wrongdoing or an intention to cheat or be

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dishonest, must be alleged and proved. *United States v. Wunderlich*." *Id.*, at 1003.

See also *Sunroc Refrigeration Co. v. United States*, 104 F. Supp. 131 (ED Pa. 1952), which, following *Leeds & Northrup*, also applied the *Wunderlich* scope of review against the Government.

II

The *Wunderlich* opinion concluded, "If the standard of fraud that we adhere to is too limited, that is a matter for Congress." 342 U. S., at 100. Almost immediately after the decision was issued, congressional legislation was sought to expand the scope of judicial review limited by *Wunderlich* to "fraud" in a narrow sense. I have attached an Appendix detailing the legislative history and shall only summarize that history here.

Although several bills were introduced in the 82d Congress, congressional attention focused upon S. 2487. In its original form, S. 2487 provided

"[t]hat no provision of any [Government] contract . . . relating to the finality or conclusiveness of any decision of the Government [official], in a dispute involving a question of fact arising under such contract, shall be construed to limit judicial review of any such decision only to cases in which fraud by such Government [official] is alleged."

Wunderlich, of course, construed the standard disputes clause, which purported to make disputes decisions final, to limit judicial review to instances of fraudulent decisions. S. 2487, then, was simply an acceptance of the invitation extended in *Wunderlich* itself. S. 2487, however, did not specify what the scope of judicial review would be, but merely directed that judicial review could not be limited to fraud. Moreover, there was no indication in the language of S. 2487 that it was over-

ruling *Wunderlich* only as to disputes decisions unfavorable to contractors. It obviously applied to the judicial review of "any such decision." (Emphasis added.)

The Comptroller General's initial report of GAO's views on S. 2487 made that abundantly clear. The report criticized *Wunderlich* as contrary to the interests of both the Government and contractors. Indeed, as a representative of the Government, the Comptroller General stressed *Wunderlich*'s undesirable impact upon the Government's interest for administrative "officials can make just as arbitrary determinations in favor of contractors, at the expense of the taxpayers."¹⁰ And, as the Assistant Comptroller General put it in his testimony at the Senate hearings, *Wunderlich* "means that the decision of the administrative officials nearly always will be final because of the extreme difficulty of proving fraud."¹¹ Because the restricted scope of judicial review prescribed in *Wunderlich* applied to the Government no less than to contractors, GAO had good reason for its concern.¹²

GAO then offered a substitute bill that it believed would protect the Government's interests. The bill provided that a disputes clause decision

"shall not be treated as binding if the General Accounting Office or a court finds that the action of [the Government official] is fraudulent, arbitrary,

¹⁰ Hearings on S. 2487 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 2d Sess., 6.

¹¹ *Id.*, at 8.

¹² It is misleading to assert, as does the Court, that *Wunderlich* "closed the courthouse doors to certain citizens." *Ante*, at 14 (emphasis added). Similarly, the concurring opinion asserts that *Wunderlich* "restricted contractor-instigated judicial review" and that the Government "prevailed" in *Wunderlich* with "a narrow judicial review standard for the contractor." *Ante*, at 22 (emphasis added). The concurring opinion's assertions are the more surprising in view of its apparent recognition that the Government was subject to the same standard of judicial review as contractors. See n. 9, *supra*.

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capricious, grossly erroneous, or that it is not supported by substantial evidence."

GAO's substitute bill thus differed from S. 2487 in two respects. First, rather than merely reversing *Wunderlich*, it explicitly defined the expanded scope of review by specifying five grounds upon which a disputes decision could be set aside. Clearly this expanded review was to operate for both contractors and the Government, just as the "fraud" standard of review always had. It would be absurd to suppose that GAO defined the expanded scope of review only for contractors.

Second, GAO's substitute bill authorized GAO review in addition to judicial review. More precisely, it empowered GAO as well as the courts to set aside any disputes decision, whether favorable to the contractor or favorable to the Government. That was a significant expansion of S. 2487. GAO never previously was empowered to upset a disputes decision. Rather, GAO authority was always limited to refusing to sanction payment on a decision favorable to a contractor, thereby forcing him into court. At that point, of course, GAO's view of the merits of the disputes decision was irrelevant. Consequently, GAO's substitute bill, if enacted, would have increased GAO's power enormously, for it effectively authorized GAO to oust the courts of all jurisdiction to review disputes decisions that GAO considered unacceptable. Not surprisingly, this part of GAO's proposal became highly controversial.

Extended hearings on S. 2487 were held in the Senate. Although most of the witnesses and statements concerned themselves solely with urging expanded judicial review for contractors, without adverting to such review for the Government, there were notable exceptions. The Associated General Contractors took the position that judicial review must be available to both parties, as did

several attorneys who specialized in the representation of contractors. Opponents of that view proposed bills that would have expressly limited the right of judicial review to contractors.¹⁴ The Comptroller General subsequently submitted another report objecting to these bills because their adoption would deprive the Government of the defense of administrative finality while permitting contractors "to utilize such defense should the accounting officers of the Government attempt to question the validity of a payment."¹⁵ It is significant that no one ever suggested during the Senate hearings that the expanded scope of review provided in S. 2487 and GAO's substitute bill was to be available only for contractors and not also for the Government.

An amended S. 2487 was reported out of Committee following the hearings.¹⁶ It provided that no disputes clause

"shall be pleaded as limiting judicial review of any [disputes] decision to cases in which fraud by [the Government] official . . . is alleged."

Thus, amended S. 2487, like the bill in its original form, contained an explicit reversal of the *Wunderlich* standard of judicial review. Like the original bill, moreover, amended S. 2487 gave not the slightest indication that it was a command solely to the Government not to "plead" the disputes clause as limiting the contractor's right to judicial review. Amended S. 2487 plainly di-

¹³ Hearings on S. 2487, *supra*, n. 10, at 29-32, 68, 83-84, 107, 114.

¹⁴ *Id.*, at 59, 107. Moreover, H. R. 6301, also introduced in the 82d Congress, provided for judicial review only in those instances "in which the contractor shall seek to set aside a decision on a disputed question between the United States and such contractor, made by an officer, board, or other representative of the United States" Neither House supported this bill.

¹⁵ Hearings on S. 2487, *supra*, n. 10, at 119.

¹⁶ See S. Rep. No. 1670, 82d Cong., 2d Sess.

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rected that no disputes clause could be pleaded to limit judicial review of *any* disputes decisions. Neither party, under amended S. 2487, could rely upon a disputes clause to limit the other party's right to judicial review to instances of fraudulent disputes decisions.

Amended S. 2487, however, went beyond the original bill by incorporating GAO's substitute bill:

"[A]nd any such provision shall be void with respect to any such decision which the General Accounting Office or a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence."

Thus, amended S. 2487 reversed *Wunderlich*, adopted GAO's definition of the expanded scope of review, and authorized GAO as well as the courts to apply that expanded review and set aside *any* disputes decisions.

The Committee Report on amended S. 2487 expressly noted "that to the same extent [the *Wunderlich*] decision would operate to the disadvantage of an aggrieved contractor, it would also operate to the disadvantage of the Government in those cases, as sometimes happens, when the contracting officer makes a decision detrimental to the Government interest in the claim."¹⁷ The reversal of *Wunderlich*, then, was clearly seen as an expansion of judicial review that would apply no matter which party, Government or the contractor, challenged the decision.

The report then explained that the addition of GAO's proposal meant that amended S. 2487 would

"have the effect of permitting review in the General Accounting Office or a court with respect to any decision of a contracting officer or a head of an agency which is found to be fraudulent, grossly erroneous,

¹⁷ *Id.*, at 2.

so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. In other words, in those instances where a contracting officer has made a mistaken decision, either wittingly or unwittingly, it will not be necessary for the aggrieved party to, in effect, charge him with being a fraud or a cheat in order to affect [sic] collection of what is rightfully due."¹⁸

Thus the expanded scope of review, explicitly defined, would be available to both parties before either GAO or a court. In short, amended S. 2487 empowered a court to set aside a disputes decision at the behest of either the Government or the contractor, and, likewise, it empowered GAO to set aside a decision challenged by either party. Although the report asserted that amended S. 2487 was intended "simply to recognize the jurisdiction which the General Accounting Office already has,"¹⁹ in fact amended S. 2487 would have given GAO the entirely new power to make a binding review of disputes decisions. It would have made GAO, as was later charged, into a second court of claims.

Although the Senate passed amended S. 2487, the 82d Congress expired without House action. When it was introduced in the Senate of the 83d Congress,²⁰ Senator McCarran, the bill's sponsor, observed that the *Wunderlich* decision "cuts two ways" and, as an example, cited a case I have already discussed, *Leeds & Northrup Co. v. United States*, 101 F. Supp. 999 (ED Pa. 1951), in which "[t]he Comptroller General . . . attempted to recover on behalf of the Government, because the mistake was against the Government. The contractor interposed a

¹⁸ *Ibid.*

¹⁹ *Id.*, at 3.

²⁰ Amended S. 2487 was introduced as S. 24, but for ease of reference I will continue to refer to it as amended S. 2487.

defense based on . . . the *Wunderlich* case. . . . [T]he result was a failure of recovery on behalf of the Government."²¹ Thus, Senator McCarran, like GAO, recognized that the narrow review permissible under *Wunderlich* bound both the Government and the contractor, and, like GAO, he considered that reversal of *Wunderlich* would also apply equally to both parties. A month later during floor debate, Senator McCarran again emphasized that while *Wunderlich* could "operate greatly to the disadvantage of contractors," it could also "operate to the disadvantage of the Government."²² The Senate then passed the bill, obviously with the understanding that the expanded scope of judicial review provided would be available to both the Government and contractors.

Amended S. 2487 was also introduced in the House of the 83d Congress.²³ At the initial House hearing in July 1953, several witnesses asserted that enactment of the bill was essential to enable both the Government and contractors to obtain effective judicial review of disputes decisions.²⁴ Opposition then developed to the provision empowering GAO to invalidate such decisions. The objection was, quite predictably, that "[t]he effect of the provision is to set up the General Accounting Office as a 'court of claims.' [A]n agency of the legislative branch . . . should not be used to perform functions intended for the judicial branch."²⁵

Understanding the precise nature of this objection is important. No one suggested that amended S. 2487

²¹ 99 Cong. Rec. 4573.

²² 99 Cong. Rec. 6170.

²³ Amended S. 2487 was introduced as H. R. 1839, but for ease of reference I will continue to refer to it as amended S. 2487.

²⁴ Hearings on H. R. 1839 et al. before Subcommittee No. 1 of the House Committee on the Judiciary, 83d Cong., 1st and 2d Sess., ser. 12, at 3-20.

²⁵ *Id.*, at 26.

did not grant the Government the same scope of judicial review that it granted contractors. Obviously, since amended S. 2487 authorized both GAO and the courts to exercise the same review, and since the objection was that GAO should not be able to set aside disputes decisions favorable to contractors, it would have been absurd to suggest that amended S. 2487 did not likewise authorize the courts to set aside such decisions. Nor did anyone question the ability of GAO to obtain judicial review for the Government through its power to refuse to approve payment on disputes decisions. All agreed that the purpose of the proposed legislation was to overturn the standard of review set by *Wunderlich*; the narrow scope of judicial review permissible under that case was to be done away with in favor of a broader, specifically defined review. The purpose was to expand judicial review, not to insert further administrative review into the disputes process. Thus, the opposition urged, not unreasonably, that the avowed purpose of overruling *Wunderlich* would not be served by expanding GAO's power to transform in into another court. Hence, deletion of GAO from amended S. 2487 would leave the power of binding review exclusively with the courts.

The Comptroller General bowed to this opposition. Stating (erroneously, I think) that GAO "has not asked for authority which it did not have before the decision in the *Wunderlich* case," he offered another substitute bill deleting the objectionable provision. He asserted that "this substitute language will accomplish what we have been striving for all along and will place the General Accounting Office in precisely the same situation it was in before" *Wunderlich*.²² This bill, in the form submitted by GAO with one minor addition, was enacted as the *Wunderlich* Act.

²² *Id.*, at 136.

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Thus, the result of GAO's attempt to obtain the power of binding review over disputes decisions was failure. That power was left where it was before the Act, solely with the courts. GAO simply retained the power it had always had, the power to force the contractor into court where the Government would get judicial review of the disputes decision in his favor.

The hearings resumed in January 1954. In urging passage of GAO's revised substitute bill, GAO's General Counsel stated that, despite deletion of the provision for binding GAO review, the bill would not only protect contractors but would also protect the Government "against decisions adverse to the interests of the United States. Certainly the rights of contract[ors] and the Government to review or appeal should be coextensive."²⁷ Similarly, the Associate General Counsel of the General Services Administration asserted that GAO's revised substitute bill was adequate to "insure an opportunity to protect the Government against excessive generosity," since GAO, under the bill, "could seek a court review by a set-off or by applying to the Department of Justice for recovery in a case where they felt that the action of the contracting officer was grossly erroneous as against the Government."²⁸

Many witnesses who opposed GAO's original substitute bill, and thus opposed amended S. 2487, now supported GAO's revised substitute bill because it made clear that the power to set aside disputes decisions was vested exclusively in the courts and not shared by the courts with GAO. There was no suggestion from anyone that deletion of GAO from amended S. 2487 also had the effect of precluding the Government from obtaining judicial review under the standards available to contractors. Any

²⁷ *Id.*, at 39.

²⁸ *Id.*, at 59.

such suggestion would have been absurd, for, as noted above, amended S. 2487 granted the courts and GAO exactly the same power. In fact, at one point in the hearings, a witness objected that GAO's revised substitute bill did "not say specifically that an appeal can be taken by an aggrieved contractor." The ensuing colloquy with Committee members made plain that the language of the bill "necessarily include[d] both parties."²⁹ Moreover, as in the case of the Senate Committee, the House Committee was presented with a proposed bill that would have expressly limited the right of judicial review to contractors.³⁰ As with the Senate, that suggestion was not adopted. Instead, the Committee reported out the bill, submitted by GAO, that is now the Wunderlich Act.

The Act expanded the scope of judicial review, and that was all it did. The Committee report made that plain. "The committee foresees no possibility of the proposed legislation creating any new rights that a contractor may not have had prior to its enactment, with the exception of the standards of review therein prescribed."³¹ Nor did the Act grant GAO new power, for, as the report said, "there is no intention of setting up the General Accounting Office as a 'court of claims.' " On the other hand, the Act did not diminish GAO's existing authority to hold up payment and force the contractor to bring suit, as the report also stressed. "The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office."³² Thus GAO authority was left exactly where it was.

²⁹ *Id.*, at 110.

³⁰ *Id.*, at 89.

³¹ H. R. Rep. No. 1380, 83d Cong., 2d Sess., 6.

³² *Id.*, at 7.

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A point I have already made about deletion of the reference to GAO bears repeating. Amended S. 2487, by incorporating GAO's original substitute bill, granted GAO precisely the same binding power of review that it granted the courts. Contractors did not object to that provision because it authorized GAO to set aside disputes decisions unfavorable to contractors. They objected because amended S. 2487 authorized GAO to set aside disputes decisions *favorable* to contractors. That power, opponents of amended S. 2487 urged, must be vested solely in the courts. They prevailed, and the reference to GAO was deleted. Deletion of the authority granted to GAO obviously could have no effect whatever on the identical authority granted to the courts."

The Senate originally passed amended S. 2487 upon the clear understanding that the expanded scope of judicial review it contained would be available to both the

³³ The Court's only foray into the legislative history is its assertion that, "Congress contemplated giving the General Accounting Office such powers and, indeed, the Senate twice passed—in the form of the McCarran bill—a provision which would have allowed the Comptroller to review disputes decisions to determine if they" satisfied the standards of the Act. *Ante*, at 11. The Court therefore concludes that the Act cannot be construed "to give the Comptroller General powers which Congress has plainly denied." *Id.*, at 12. Similarly, the concurring opinion asserts that "[t]he flat rejection by Congress of the proposed provision for GAO review is significant. There would be no point in that rejection if GAO has the power to defeat the finality of the disputes decision anyway." *Ante*, at 22-23. Unfortunately, the Court and the concurring opinion overlook that the proposed provision was not simply "for GAO review." It was for *binding* GAO review. Because it was not enacted, GAO does not "have a veto of AEC's 'final' decision," *ante*, at 9 (opinion of the Court); GAO does not have "power to defeat the finality of the disputes decision," *ante*, at 23 (concurring opinion). Both the Act and the disputes clause specifically provide that only a court can set aside a disputes decision. And that is precisely the point the legislative history makes clear.

Government and contractors. When the House bill came to the Senate after deletion of the GAO provision, Senator McCarran, who had previously stressed that *Wunderlich* hurt both the Government and contractors, explained that while the House bill differed from the bill passed by the Senate, since it deleted the authority to GAO, it was "designed to accomplish the same purpose."²⁴ That purpose, of course, was to overturn *Wunderlich* and to provide the courts with grounds of review in addition to fraud. The two bills could not, of course, "accomplish the same purpose" if the House bill authorized expanded judicial review only for contractors, leaving the Government either with the *Wunderlich* standard or with no review at all. After Senator McCarran responded affirmatively to the statement that the difference was only "a modification of the language in the Senate bill, and the two bills agree in their effect,"²⁵ the Senate passed the House bill.

The text of the Act is its own witness to the congressional purpose. It provides that no clause in a Government contract purporting to make final an administrative determination of a dispute arising under the contract "shall be pleaded in any suit . . . as limiting judicial review." The proviso then defines the applicable scope of review.

It is impossible to read the plain words of this statute as directing that judicial review is available only for disputes decisions unfavorable to contractors. Indeed, the language is so clear that there should be no need to search through the legislative history for a contrary meaning.²⁶ That history, in any event, demonstrates that the Act means exactly what it says.

²⁴ 190 Cong. Rec. 5717.

²⁵ 100 Cong. Rec. 5718.

²⁶ The need arises in this case only because petitioner argues that, despite the clear language of the Act, the legislative history reveals that Congress meant to reserve the right of judicial review solely

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Two significant considerations buttress my conclusion that the Court's construction of the Act is patently and grievously erroneous.

First. The bill that became the Wunderlich Act was a *Government* bill. As the Committee report said, the Act, with a minor exception, "is exactly the same legislation suggested by the Comptroller General."³⁷ GAO offered it as a substitute for the original S. 2487 because of *Government* concern that administrative "officials can make just as arbitrary determinations in favor of contractors, at the expense of the taxpayers."³⁸ The bill explicitly stated that the expanded scope of review would add to "fraudulent" the grounds that the disputes decision was "arbitrary," "capricious," "grossly erroneous," or "not supported by substantial evidence." After GAO modified the bill to delete the provision authorizing GAO review, in addition to court review, on those grounds, *Government* procurement agencies joined forces with GAO in strong support of passage. It is absurd to suppose that the *Government* pressed for a bill that granted *contractors* an expanded scope of judicial review, inserted in the bill by the *Government*, yet denied the *Government* judicial review on those same grounds.

Second. That absurdity is compounded by the consequences that result from interpreting the Act to deny

to contractors. It is thus somewhat odd that the Court considers it worthwhile to assert "that the Act's legislative history 'has something for everyone'" and that the Court "find[s] the Act's history at best ambiguous." *Ante*, at 13 n. 9. The concurring opinion likewise professes to find the legislative history "decidedly ambiguous at best," *ante*, at 22, yet nevertheless goes on to assert that Congress "*intended* to relieve *contractors*" and "opened the door to the *contractor*," *ibid.* (emphasis added). These comments are all the more inexplicable because neither the Court nor the concurring opinion attempts even the most cursory analysis of the text of the Act itself.

³⁷ H. R. Rep. No. 1380, *supra*, n. 31, at 6.

³⁸ See n. 10, *supra*.

the Government judicial review of disputes decisions. Before *Wunderlich*, the Government could challenge the finality of those decisions at least on the ground of fraud. If the Act affords only contractors judicial review and denies review to the Government, it follows that the Government has been deprived even of the right it had under *Wunderlich* to challenge "fraudulent" disputes decisions. The principal Government procurement agencies, now including the Atomic Energy Commission, have created contract appeals boards as the final level of agency review of disputes decisions. Because the Act expressly provides for judicial review of such "board" decisions, interpreting it to deny the Government review means that however "fraudulent," however "arbitrary," however "capricious," however "grossly erroneous," however clearly "not supported by substantial evidence" the board's determination, the procurement agency and the Government itself are helpless to redress the wrong. In this case, that might mean the loss of more than one million dollars to American taxpayers. But at stake are countless millions. To say that *Government* wrote and secured passage of a bill to work that result is preposterous."

III

So far as I can penetrate the Court's opinion, its primary premise is exposed by such sentences as these: "The purpose of avoiding 'vexatious litigation' would

²⁹ The concurring opinion asserts that "[i]n the exercise of its legislative judgment, Congress has determined that in this area the Government," unlike contractors, does not need the Act's protection "against fraud, capriciousness, arbitrariness, bad faith, and absence of evidence." *Ante*, at 23. As the concurring opinion never refers to the language of the Act, and finds the legislative history "not at all 'that clear,'" "decidedly ambiguous at best," *id.*, at 22, and "inconclusive," *id.*, at 23, it is difficult to understand the basis for this statement.

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not be served, however, by substituting the action of officials acting in derogation of the contract." *Ante*, at 8.⁴⁰ "Neither the Wunderlich Act nor the disputes clause empowers any other administrative agency to have a veto of AEC's 'final' decision or authority to review it." *Id.*, at 9. "In other words, we cannot infer that by some legerdemain the disputes clause submitted the dispute to further administrative challenge or approval...." *Ibid.* "Here, the AEC spoke for the United States and its decision, absent fraud or bad faith, should be honored." *Id.*, at 10.⁴¹ "Since the AEC withheld payment solely because of the views of the Comptroller General and since he had been given no authority to function as another tier of administrative review, there was no valid reason for AEC not to settle with petitioner according to its earlier decision." *Ibid.*⁴² "That action by the

⁴⁰ This statement, albeit obscurely, may mean that the purpose of avoiding litigation would not be served by subjecting a disputes decision in favor of the contractor to judicial review, for that would be litigation. Yet just as obviously the purpose of avoiding litigation would not be served by subjecting a disputes decision against the contractor to judicial review.

⁴¹ See n. 4, *supra*, n. 43, *infra*.

⁴² This is a difficult statement to understand. Assume that the Commission had "no valid reason" not to pay petitioner. Was the Commission's nonpayment in violation of the contract? Was it in violation of the Wunderlich Act? The Court does not say. If nonpayment violated neither the contract nor the Act, it seems rather strange that this Court should order the Commission to pay. The Court's statement appears to be connected with its later statement that "AEC has not, to this day, repudiated the merits of its decisions in favor of petitioner," *Ante*, at 19. Again, however, the Court does not say how or even whether the Commission's "non-repudiation" violated the contract or the Act.

In the same vein, the concurring opinion asserts that there is "a possible breach of contract" in this case: "When the United States then disavows the Commission's decision—a decision which, as the Court notes, to this day has never been withdrawn or repudiated by the AEC—it seems to me that the Government imposes

Comptroller General was a form of additional administrative oversight foreclosed by the disputes clause." *Id.*, at 12. "[The Act] should not be construed to require a citizen to perform the Herculean task of beheading the Hydra in order to obtain justice from his Government." *Id.*, at 14. "We are reluctant to construe a statute enacted to free citizens from a form of administrative tyranny so as to subject them to additional bureaucratic oversight, where there is no evidence of fraud or overreaching." *Id.*, at 14.⁴³ "This objective [preventing the inflating of bids] would be ill-served if Government contractors—having won a favorable decision before the agencies with whom they contracted—had also to run the gantlet of the General Accounting Office and the Department of Justice." *Id.*, at 14–15.

The Court's *bête noire*, then, is primarily the General Accounting Office, with a sideswipe at the Department of Justice. We are left to infer, I gather, that Congress shared the Court's distaste for the activities of those agencies in these cases and enacted the Wunderlich Act not only to arm contractors with expanded grounds of judicial review of disputes decisions favorable to the Government, but also, by the device of denying judicial review to the Government, to abolish the authority of GAO to disapprove payments to contractors under disputes decisions, thus forcing contractors to sue, and, by that device, to relieve the Department of Justice of any suits

something to which the contractor has not agreed." *Ante*, at 21, 22. The concurring opinion, however, does not say how the Government's "disavowal" violated the contract.

⁴³ If this statement implies that a contractor is "subject . . . to additional bureaucratic oversight, where there is . . . evidence of fraud or overreaching" (emphasis added), one might well ask why that is so. Fraud is only one of the five grounds of judicial review specified in the Act and the disputes clause. Obviously either all or none are available. See n. 4, *supra*.

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to defend on behalf of the United States. There are three dispositive answers to the Court's supposition.

First. The notion that Congress enacted the Wunderlich Act to abolish the authority of GAO and the Department of Justice is completely a figment of the Court's own imagination. As the judicial history shows, both agencies have exercised for decades powers identical to those exercised in this case, with no prior complaints that I can discover and with complete congressional approval. I need only quote from the Committee report that accompanied the bill that is now the Wunderlich Act.

"The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.

"The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office. *It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill. At the same time there is no intention of setting up the General Accounting Office as a 'court of claims.'* Nor should the elimination of the specific mention of the General Accounting Office in the bill be construed as limiting its review to the fraudulent intent standard prescribed by the Wunderlich decision.

"The specific intent of this legislation, insofar as it affects the General Accounting Office, is explicitly stated in the letter . . . from the Comptroller General himself . . ."

The report then quoted from the Comptroller General's letter, in which he said that GAO "has not asked for authority which it did not have before the decision in the *Wunderlich* case," and in which he quoted from the Senate Committee's report on amended S. 2487:

"[I]t is not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office, either in the course of a settlement or upon audit; [it] is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has."

Second. The case law detailed earlier in this opinion, including *Eaton, Brown & Simpson, Inc. v. United States*, 62 Ct. Cl. 668 (1926), in which GAO disagreed with a disputes decision in favor of the Government and paid the contractor, establishes without question that GAO has no power to overturn a disputes decision. The limit of its authority is to refuse to sanction payment to the contractor and thus force him to bring suit. The judicial precedents in this Court, the Court of Claims, and the district

⁴⁴ H. R. Rep. No. 1380, *supra*, n. 31, at 6-7 (emphasis added). This detailed refutation that GAO authority was being curtailed was necessary to allay the fears expressed by the attorney who argued *Wunderlich* for the contractor. He testified during the House hearings that deletion of GAO from amended S. 2487, passed by the Senate, might be misconstrued as depriving GAO of its prior authority to refuse to sanction payment and thereby "throw the matter into court." See Appendix, *infra*, at 78-80. Today's decision fulfills his prophecy.

courts are explicit that only a court can determine the merits of the dispute within the grounds of review specified by the Wunderlich Act. It is therefore completely irrelevant that "the AEC withheld payment solely because of the views of the Comptroller General." *Ante*, at 10. Indeed, the Court itself exposes the fallacy of its own position when it states that "the disputes clause in the contract says that the decision of the AEC is 'final and conclusive,' unless a court determines that the award is vulnerable under §§ 1 and 2 of the Act." *Id.*, at 3-4 (emphasis added). See also *id.*, at 9: "By the disputes clause the decision of AEC is 'final and conclusive' unless 'a court of competent jurisdiction' decides otherwise for the enumerated reasons." (Emphasis added.)

Third. Similarly, the Court states, in response to the Government's nonexistent contention that the Department of Justice has "the power to overturn decisions of coordinate offices of the Executive Department," *id.*, at 12, "That power [of the Department of Justice to defend suits against the United States] is pervasive but it does not appear how under the Wunderlich Act it gives the Department of Justice the *right to appeal* from a decision of the Atomic Energy Commission," *id.*, at 12-13 (emphasis added). See also *id.*, at 13: "The *power to appeal* to the Court of Claims a decision of the federal agency under a disputes clause in a contract which the agency is authorized to make is not to be found in the Wunderlich Act and its underlying legislative history." (Emphasis added.) No one suggests that the Department of Justice has a "right to appeal." It is involved in this case only because GAO's refusal to sanction payment forced petitioner to sue the United States, thus creating a lawsuit that the Department of Justice, as the Government's lawyer, had a duty to defend. It would be strange if the Department had a duty to confess judgment.

In support of its construction of the Act, the Court

makes a statement, which I have already quoted, that invites a further comment:

"[J]udicial review was provided so that contractors would not inflate their bids to take into account the uncertainties of administrative action. This objective would be ill-served if Government contractors—having won a favorable decision before the agencies with whom they contracted—had also to run the gantlet of the General Accounting Office and the Department of Justice." *Id.*, at 14–15.

Contractor witnesses at the committee hearings asserted that contractors would have to inflate their bids if they could attack a disputes decision only on the ground that it was fraudulent. As the Court says, the Act resolved this problem by expanding the scope of judicial review, so that contractors can attack a disputes decision on grounds in addition to fraud. *That* was the protection Congress gave contractors so that they would not have to inflate their bids.

After recognizing this, the Court says that because contractors got expanded judicial review to prevent the necessity of inflating bids, they *also* got the benefit of ~~not~~ having decisions in their favor subject to judicial review *at all*, since otherwise the objective of preventing inflated bids "would be ill-served." It would be difficult to imagine a more obvious *non sequitur*. The Court could as easily say that "[t]his objective would be ill-served" if the contractors ever lost a disputes decision.

I might add that the Court does not say that the "objective would be ill-served" if favorable contractor decisions were subject to *judicial review*; it says that the "objective would be ill-served" if contractors "had also to run the gantlet of the General Accounting Office and the Department of Justice." Yet what the Court means, of course, is judicial review, for neither GAO nor

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the Department of Justice can take a favorable decision away from a contractor. Only a *court* can do that.

The Court is forced to go to extreme lengths to assert that the Government still may have relief for fraud. That is because the Court concedes, as it must, that its construction of the Act denying the Government judicial review forecloses review of disputes decisions that are "fraudulent," just as it forecloses judicial review of decisions that are "arbitrary," "capricious," "grossly erroneous," or "not supported by substantial evidence." The Court's attempted escape is to suggest that the Government may have relief for fraud under the statutes in which "Congress has made elaborate provisions for dealing with fraudulent claims of contractors." *Id.*, at 16. Apart from the absence of any explanation why, if statutory remedies were always available, this Court found it necessary to fashion, for Government and contractor alike, a judicial exception to the finality of disputes decisions, the point is frivolous.⁴⁵ Obviously the fraud statutes the Court mentions have no application whatever to the fraud we are discussing in this case.

The "fraud" that is an issue in a disputes clause case is *not* contractor fraud. Not one case construing a disputes clause, from 1878 to the present day, ever mentions "fraud" by the *contractor*. Nor has anyone ever sug-

⁴⁵ The Court asserts that "[i]f the Comptroller General has the broad, roving investigatory powers that are asserted, specific statutory grants of authority such as this provision [41 U. S. C. § 53] relating to kickbacks would be superfluous." *Ante*, at 10 n. 8. The GAO authority asserted here, however, is simply the authority to refuse to sanction payment under a disputes decision on the ground that the decision does not satisfy the standards of the Wunderlich Act. The Act, of course, has nothing whatever to do with illegal activities of contractors. It concerns only the finality of administrative disputes decisions. Enforcement of the Act obviously would not make the statutory prohibition of kickbacks "superfluous."

gested that the Government needs judicial review of disputes, decisions to guard against fraud by the contractor. The "fraud" that is involved is a *fraudulent decision*. The disputes clause and the Act itself provide judicial review to determine whether the "*decision . . . is fraudulent*." (Emphasis added.) When a disputes decision is challenged, the only questions concern that decision: was it "fraudulent"? was it "capricious"? was it "arbitrary"? was it "grossly erroneous"? was it "not supported by substantial evidence"? "The Court is absolutely right that "[a] contractor's fraud is of course a wholly different genus than the case now before us." *Id.*, at 15.

IV

The time-tested standards of statutory construction require interpretation of the statutory wording to effect the congressional purpose as revealed by legislative history. The Court totally discards those standards in construing the Wunderlich Act. Instead, the Court purports to discover a nonexistent hostility of Congress toward the "intermeddling," *id.*, at 19, of GAO and the Department of Justice in the disputes process and for that reason a congressional purpose to prevent the subjection of "citizens . . . to additional bureaucratic oversight," *id.*, at 14. The virtually century-long judicial history that forms the background of the Act, its explicit language, and its clear legislative history completely refute the proposition. I dissent and would affirm the judgment of the Court of Claims.

"Even my Brother DOUGLAS once recognized this: "We should allow the Court of Claims, the agency close to these disputes, to reverse an official whose conduct is plainly out of bounds whether he is fraudulent, perverse, capricious, incompetent, or just palpably wrong." *United States v. Wunderlich*, *supra*, at 102 (dissenting opinion) (emphasis added).

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APPENDIX TO OPINION OF BRENNAN, J.,
DISSENTING

Within two months after the decision in *United States v. Wunderlich*, 342 U. S. 98 (1951), six bills to expand the scope of judicial review of agency disputes decisions were introduced. S. 2432 (Sen. Chavez); S. 2487 (Sen. McCarran); H. R. 6214 (Rep. Celler); H. R. 6301 (Rep. Springer); H. R. 6338 (Rep. Wilson); H. R. 6404 (Rep. Walter). Hearings were held in the Senate on S. 2487. Hearings on S. 2487 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 2d Sess. (1952). S. 2487 provided:

"That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the Government contracting officer, or of the head of the department or agency of the United States concerned or his representative, in a dispute involving a question of fact arising under such contract, shall be construed to limit judicial review of any such decision only to cases in which fraud by such Government contracting officer or such head of department or agency or his representative is alleged." *Id.*, at 1.

The Comptroller General's report to the Judiciary Committee, setting forth GAO's views on S. 2487, stated that GAO felt that the result of the *Wunderlich* decision was "undesirable both as to the contractor's interests and the interests of the Government." *Id.*, at 5-6. The Comptroller General stressed the latter interest.

"I am as deeply concerned, however, that the rule allows the contracting officials uncontrolled discretion over the Government's contractual affairs as well and places them in a position to make as arbitrary and reckless use of their power against the

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interests of the Government as against the interests of the contractor. In other words, deciding officials can make just as arbitrary determinations in favor of contractors, at the expense of the taxpayers." *Id.*, at 6.

The report concluded that GAO considered S. 2487

"inadequate and . . . objectionable because no provision is made therein for a review of decisions of administrative officers by the General Accounting Office. Without a provision to that effect the General Accounting Office in performing its statutory functions would be precluded from questioning the propriety or legality of payments made to a contractor as the result of an arbitrary or grossly erroneous decision on the part of the contracting officer." *Id.*, at 7.

The report recommended a substitute bill, which provided that

"Any stipulation in a Government contract to the effect that disputed questions shall be finally determined by an administrative official, representative or board shall not be treated as binding if the General Accounting Office or a court finds that the action of such officer, representative or board is fraudulent, arbitrary, capricious, grossly erroneous, or that it is not supported by substantial evidence." *Ibid.*

Frank L. Yates, the Assistant Comptroller General, expanded on the report in his testimony before the Subcommittee. He asserted that prior to *Wunderlich* disputes clause decisions on questions of fact arising under Government contracts "were not disturbed by the General Accounting Office or the courts unless the action of the administrative officer was fraudulent, arbitrary, capricious, grossly erroneous, or without foundation in fact."

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Wunderlich, Mr. Yates said, "means that the decision of the administrative officials nearly always will be final because of the extreme difficulty of proving fraud." *Id.*, at 8. And, he continued, "the rule works both ways," for "[a] deciding administrative official can make decisions adverse to the Government as well as to contractors, in which event an improper decision results in a burden, an improper burden, to the taxpayers of the country." *Id.*, at 9. Thus, he said, "it appears that the executive contracting agencies without specific legislation authorizing them to do so, may, by agreement with the contractor, circumvent the operations of courts and the General Accounting Office to the serious detriment of both private business and the Government." *Id.*, at 9-10. Mr. Yates explained that GAO's substitute bill would restore "to the courts and to the General Accounting Office . . . their normal and proper jurisdiction," for

"it would permit [administrative officers] to make determinations on questions of fact which would have final effect if the decisions were not found by the General Accounting Office or the courts to be fraudulent, arbitrary, capricious, et cetera. Such a law not only would protect a contractor from fraudulent, arbitrary or capricious action by giving him, in addition to resort to the courts, a further administrative remedy before the General Accounting Office . . . but it would also provide a protection, through the General Accounting Office, against decisions adverse to the interests of the United States. Certainly the rights of contractors and the Government to review or appeal should be coextensive." *Id.*, at 11.

The managing director of the Associated General Contractors, H. E. Foreman, testified that the construction industry had for many years attempted without success to secure changes in the standard disputes clause. The

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industry's latest proposed disputes clause, which Mr. Foreman read at the hearing, provided "[t]hat nothing in this contract . . . shall void the right of either party to this contract carrying the dispute before a court of competent jurisdiction." *Id.*, at 24. The association's general counsel, John C. Hayes, stated that its position was "that any decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based." *Id.*, at 29. (In amplifying on this position, Mr. Hayes testified that only "by permitting judicial review of the contracting officer's decision . . . can the rights of both the contracting parties be protected." Although he then referred to the need for legislation that would authorize the courts to "enter judgment against the United States on any claim in which the contractor shall seek a review" of a disputes decision, he immediately added that the legislation should provide "that any provision in any contract with the United States abridging the right of the parties to court review shall be null and void." *Id.*, at 30. Finally, in commenting on GAO's proposed substitute bill, Mr. Hayes said that the association "would welcome further administrative review," but that contractors also "should be permitted our judicial review, whether it be the government or whether it be the contractor, it doesn't make any difference. It has to cut both ways . . ." *Id.*, at 31. Replying to a specific question, Mr. Hayes denied that judicial review "was a one-way street in favor of the contractor," repeating that "it cuts both ways." He concluded that the association wished "to take the position of being absolutely fair in urging legislation that will protect the rights of both Government and contractor." *Id.*, at 32.

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There was much discussion of GAO's substitute bill and GAO's role in the review of agency disputes decisions. A former counsel to the Comptroller General, O. R. McGuire, testified that GAO's review should be limited to questions of law and that GAO should "accept the facts, unless, of course, there is fraud, or just gross mistake." *Id.*, at 41. John W. Gaskins, who was on the brief for Wunderlich in the Supreme Court, proposed a revision of GAO's substitute bill specifically granting both GAO and the courts "jurisdiction to set aside any [administrative] decision" that did not comport with the standards set out in GAO's bill. *Id.*, at 68. Gardiner Johnson, an attorney who specialized in the representation of contractors, testified that, as he understood GAO's position, GAO "simply wanted practically the same right that the contractors are requesting, to take an appeal from what they consider to be an unfair and unreasonable decision." *Id.*, at 84. As so understood, he said, "our people have no basic quarrel with that. We are against all forms of unfair, unreasonable decisions either against the Government and the taxpayer or against the contractor." *Id.*, at 83.

Most of the witnesses and most of the submitted statements, however, were concerned only with protecting contractors. *E. g.*, *id.*, at 2-3, 62, 70-75, 85-87, 119-136. A few witnesses went even further. Robert E. Kline, Jr., an attorney representing the National Association of River and Harbors Contractors, proposed amendments to S. 2487 designed "to assure full restoration to Government contractors of their inherent right to judicial review of unjust decisions by Government contracting officers and department heads." *Id.*, at 58. These amendments specifically limited the legislation to contractors' suits in which a court would "enter judgment against the United States." *Id.*, at 59. Alan Johnstone, an attorney representing a contractor, initially suggested that the legisla-

tion "should provide . . . simply that all administrative determinations in the performance of a contract with the United States shall be subject to review by the Comptroller General and by the courts, according to law, the provisions of any such contract to the contrary notwithstanding." *Id.*, at 61-62. Mr. Johnstone returned to testify later and, although expressing a preference for a "bill mak[ing] justiciable any grievance which either of the parties to the contract would have," submitted two proposed bills on behalf of himself, Mr. McGuire, and Mr. Gaskins, both of whom had already testified, and Harry D. Ruddiman, who subsequently testified at the House hearings. These proposals made judicial review available only to contractors, one providing that "the United States shall not employ as a defense the finality of" agency decisions, the other that "the United States shall not avail itself of the defense of the finality of such decision[s]." *Id.*, at 107.

In contrast, the Associated General Contractors, adhering to the position its representatives had taken at the hearings, submitted a resolution adopted at its annual convention stating that any disputes decision "should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based," and urging legislation that would provide "that any provision in any contract with the United States abridging the rights of the parties thereto to court review shall be null and void." *Id.*, at 114.

After the hearings concluded, the Comptroller General sent the Committee a copy of his report to the Chairman of the House Judiciary Committee dealing with the House bills. *Id.*, at 116-119. This report reiterated many of the comments made in the Comptroller General's earlier report to the Senate Committee. The re-

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port also objected to the two proposed bills, submitted by Mr. Johnstone, limiting judicial review to contractors on the ground that "the Government would be precluded from employing the finality of the administrative decision as a defense to a suit, [while] the contractors would be free to utilize such defense should the accounting officers of the Government attempt to question the validity of a payment made to a contractor." The report, as did the prior one, recommended adoption of GAO's substitute bill. *Id.*, at 119.

S. 2487 was reported out in amended form, incorporating the substance of GAO's proposal. As amended, S. 2487 provided

"That no provision of any contract entered into by the United States, relating to the finality or conclusiveness, in a dispute involving a question arising under such contract, of any decision of an administrative official, representative, or board, shall be pleaded as limiting judicial review of any such decision to cases in which fraud by such official, representative, or board is alleged; and any such provision shall be void with respect to any such decision which the General Accounting Office or a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. . . ." S. Rep. No. 1670, 82d Cong., 2d Sess., 1 (1952).

The Committee report stated that "[t]he purpose of the proposed legislation is to overcome the inequitable effect, under a recent Supreme Court decision, of language in Government contracts which makes the decision of the contracting officer or the head of the agency final with respect to questions of fact." *Ibid.* The report pointed out that to the same extent [the *Wunderlich*] decision

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would operate to the disadvantage of an aggrieved contractor, it would also operate to the disadvantage of the Government in those cases, as sometimes happens, when the contracting officer makes a decision detrimental to the Government interest in the claim." *Id.*, at 2. The report further explained that

"S. 2487 will have the effect of permitting review in the General Accounting Office or a court with respect to any decision of a contracting officer or a head of an agency which is found to be fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. In other words, in those instances where a contracting officer has made a mistaken decision, either wittingly or unwittingly, it will not be necessary for the aggrieved party to, in effect, charge him with being a fraud or a cheat in order to affect [*sic*] collection of what is rightfully due." *Ibid.*

Finally, the report stressed that amended S. 2487 was "not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office . . . but simply to recognize the jurisdiction which the General Accounting Office already has." *Id.*, at 2-3.

Although the Senate, without debate, passed amended S. 2487, 98 Cong. Rec. 7783-7784; *id.*, at 9059, the House did not act upon it during the 82d Congress. It was reintroduced in the Senate of the 83d Congress as S. 24. The Committee report was, with formal changes, identical to the report on amended S. 2487. S. Rep.-No. 32, 83d Cong., 1st Sess. (1953). Senator McCarran, the bill's sponsor, explained on the floor that the effect of the *Wunderlich* decision was to require "that the aggrieved party allege and prove that some Government employee deliberately cheated, or intended to defraud

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him, in order to get a court review of the question." 99 Cong. Rec. 4572. He also noted that:

"Senators who have looked into this matter know that this decision of the Supreme Court cuts two ways. It can hurt the Government badly; as well as doing an injustice to contractors. In a recent case . . . [t]he Comptroller General . . . attempted to recover on behalf of the Government, because the mistake was against the Government. The contractor interposed a defense based on . . . the *Wunderlich* case. . . . [T]he result was a failure of recovery on behalf of the Government.

"It was because of this case . . . that the Comptroller General . . . testified before the Judiciary Committee in behalf of this bill." *Id.*, at 4573.

Later the same day, however, Senator McCarran stated that the Air Force "objected to the fact that the bill gave the Comptroller General the same right that was given to a contractor to question a decision of a contracting officer." *Id.*, at 4598. He also stated that "the Comptroller General feels that in order to protect the interests of the Government, it is necessary that he shall have as much right to question the decision of a contracting officer . . . as may be given to the private party to the contract." *Id.*, at 4599. When S. 24 reached the floor a month later, Senator McCarran again emphasized that while the *Wunderlich* decision could "operate greatly to the disadvantage of contractors," it could also "operate to the disadvantage of the Government." *Id.*, at 6170. The Senate then passed the bill. *Id.*, at 6201.

Representative Reed introduced amended S. 2487 in the House as H. R. 1839, and hearings were held on it and two related bills, H. R. 3634 (Rep. Celler) and H. R. 6946 (Rep. Willis). Hearings on H. R. 1839 et al. before Subcommittee No. 1 of the House Committee on

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the Judiciary, 83d Cong., 1st and 2d Sess., ser. 12^b (1953, 1954).

At the initial hearing in July 1953, all witnesses supported the bill. Elwyn L. Simmons, a contractor, asserted that, because of "incompetent or negligent or capricious agency representative[s]," the *Wunderlich* decision could "work as readily against the Government's interests as against that of the contractor" and that "only your immediate legislative action through enactment of H. R. 1839 or S. 24 can now protect both the Government and the contractor from this . . . unprecedented situation." *Id.*, at 4. Referring to the Senate debates on S. 24, Mr. Simmons noted

"that there was some objection by contractors doing business with the Air Force to the inclusion of the GAO under the provisions of this bill. I do not know what basis these Air Force contractors have for their objection, but we as general contractors are used to the GAO in our business and their auditing staff and forms no basis for our objection." *Id.*, at 5.

George P. Leonard, an officer of the *Wunderlich* Contracting Co., testified that because of *Wunderlich* "neither the Government through the GAO, nor the contractors through the courts, have any right to appeal from contracting officers' decisions even though they may be grossly erroneous." *Id.*, at 7. He added that he saw "no reason why anybody should object to either the General Accounting Office or the courts passing on these decisions of the contracting officers." *Id.*, at 8.

Harry D. Ruddiman, who argued for *Wunderlich* before the Supreme Court, submitted a prepared statement asserting that unless H. R. 1839 was enacted, "not only the contractor but also the Government, will be unable to obtain effective judicial review of contracting officers' decisions." In his view, H. R. 1839 "would restore to

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the courts an effective review of determinations made by contracting officers." *Id.*, at 12. Although, in light of the Senate reports on amended S. 2487 and S. 24, Mr. Ruddiman discounted "[f]ears . . . that the reference to the General Accounting Office in S. 24 would give it powers with respect to the review of payments under Government contracts beyond those which it already possesses," he suggested in his statement that "any doubt on the matter . . . can very easily be removed by striking out the words 'the General Accounting Office or' " in H. R. 1839. *Id.*, at 13. In his testimony, however, Mr. Ruddiman expressed reservations about removing GAO from the bill.

"Lastly, I would like to deal with an objection which has been raised to including the General Accounting Office in the provisions of this bill. I don't know just exactly what the basis of the objection is, but in my opinion, any fears along that line are groundless. As I see it, the General Accounting Office, as a matter of practice, in reviewing contracts and change orders for purposes of payment, is always going to apply the standards of review that are granted to the courts. That has been their practice before the Wunderlich decision. They figured if there was good reason to doubt the finality of the decision, the matter ought to be referred to the courts. I think that is all that would be done by the language of this bill.

"At one time I thought there would probably be no objection to striking out the reference to the General Accounting Office as mentioned in S. 24 or H. R. 1839. I felt that even if you had no reference, the General Accounting Office would still exercise that same jurisdiction. However, in view of the fact that the Senate has already passed a bill which has included a reference to the General Ac-

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counting Office, I think it would be dangerous now to eliminate the General Accounting Office from the provisions of this bill. It might be misconstrued as taking away this jurisdiction from the General Accounting Office." *Id.*, at 16.

Representative Graham, a committee member, replied that it was "needless to refer to" GAO anyway. *Ibid.* Mr. Ruddiman, however, adhered to his view in a letter to the Subcommittee the following day.

"I feel that if the bill, as passed by the Senate, had contained no reference to the General Accounting Office, and the House of Representatives had passed such a bill without amendment, the General Accounting Office as a practical matter would, in reviewing payments under Government contracts and change orders, employ these same standards of review that are granted by the bill to the courts. Thus, if the General Accounting Office was confronted with an administrative decision which it thought would be set aside by the courts, it would refuse to make payment and throw the matter into court. However, since the Senate, in passing S. 24, has expressly included the General Accounting Office in the bill, some doubt as to the General Accounting Office jurisdiction might arise if the House of Representatives should then strike out all reference to the General Accounting Office. There would then be the possibility that this action would be construed as limiting review by the General Accounting Office to the ineffective ground of fraudulent intent prescribed by the Wunderlich decision. It is therefore my suggestion that the bill be passed without change in the language employed by the Senate." *Id.*, at 17.

Alan Johnstone, the final witness of the day, likewise

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urged that GAO be left in H. R. 1839. *Id.*, at 18. He said that "this bill would throw wide the portals of the courts of justice to anyone, including the Government, which has a grievance," and, referring, as had Senator McCarran, to *Leeds & Northrup Co. v. United States*, 101 F. Supp. 999 (ED Pa. 1951), in which a contractor successfully asserted a *Wunderlich* defense, he said "that what is sauce for the goose is sauce for the gander." *Id.*, at 19.

Opposition to H. R. 1839 was also becoming apparent. Among the letters sent to the Committee, *id.*, at 22-30, all calling for legislation to protect the rights of contractors, was one urging deletion of the reference to GAO because "[t]he effect of the provision is to set up the General Accounting Office as a 'court of claims.' . . . [A]n agency of the legislative branch . . . should not be used to perform functions intended for the judicial branch." *Id.*, at 26.

Shortly before the hearings resumed in January 1954, the Comptroller General wrote the Chairman of the Committee about H. R. 1839. He noted that "there was considerable opposition to the bill from some quarters . . . on the basis . . . that the General Accounting Office should not be given express authority by statute to review and overrule the determinations of administrative officials." *Id.*, at 135. He responded that GAO "has not asked for authority which it did not have before the decision in the *Wunderlich* case," and he referred to the statement in the Senate reports that the bill would not affect GAO's jurisdiction. Nevertheless, he then presented a substitute bill, to which he said there would be little or no opposition by industry groups and administrative agencies. He stated that "this substitute language will accomplish what we have been striving for all along and will place the General Accounting Office in

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precisely the same situation it was in before" *Wunderlich*. *Id.*, at 136. GAO's proposed bill provided:

"That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. . . ." *Ibid.*

With the addition of the words "in any suit now filed or to be filed," added to deal with retroactivity problems, see, *e. g.*, *id.*, at 48, 82, GAO's bill eventually was enacted as the Wunderlich Act.

In commenting upon GAO's bill, E. L. Fisher, GAO's general counsel, reiterated much of the testimony of the Assistant Comptroller General, Mr. Yates, at the Senate hearing. Mr. Fisher, as had Mr. Yates, stressed that the *Wunderlich* "rule works both ways. A deciding administrative official can make decisions adverse to the Government as well as to contractors." *Id.*, at 38. Mr. Fisher, in language virtually identical to that earlier used by Mr. Yates, urged passage of either H. R. 1839 or GAO's proposed substitute because they

"would permit [administrative officers] to make determinations on questions of fact which would have final effect if the decisions were not found by the General Accounting Office or the courts to be fraudulent, arbitrary, capricious, and so forth. Such a law not only would protect a contractor from fraud-

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ulent, arbitrary or capricious action by giving him, in addition to resort to the courts, a further administrative remedy before the General Accounting Office, and would also provide a protection, through the General Accounting Office, against decisions adverse to the interests of the United States. Certainly the rights of contract[ors] and the Government to review or appeal should be coextensive."

Id., at 39.

The associate general counsel of the General Services Administration, J. H. Macomber, Jr., similarly emphasized the need to protect the Government's interests, stating "that there should be some provision in the legislation, if not an explicit provision at least by appropriate wording with respect to the judicial review portion, that will insure an opportunity to protect the Government against excessive generosity, against decisions of the contracting officer adverse to the Government." *Id.*, at 59. Mr. Macomber suggested that

"there might be some doubt under the wording of H. R. 6946 . . . where specific reference is made to a finding by the court[,] as to whether the General Accounting Office could seek a court review by a setoff or by applying to the Department of Justice for recovery in a case where they felt that the action of the contracting officer was grossly erroneous as against the Government. I think that the language suggested by the Comptroller General's revision gets away from that difficulty." *Ibid.*

Mr. Simmons, a contractor who had supported H. R. 1839 at the initial hearing, appeared again to support GAO's substitute bill on the ground that it "was prepared to meet objections of certain industries against giving the General Accounting Office express statutory authority to review administrative decisions under the disputes

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clause, and is designed to give the General Accounting Office no more authority in this connection than it had before the Wunderlich decision." *Id.*, at 76.

Many other witnesses supported GAO's substitute bill on essentially the same grounds. *E. g.*, *id.*, at 52-56, 77-88, 91-95, 101-104, 123-124. Louis F. Dahling, associate counsel for the Automobile Manufacturers Association, asserted that H. R. 1839 would "make the General Accounting Office another Court of Claims" and thus deprive contractors of their day in court.

"Now, it does not appear from the language in that bill that there would be any appeal from a decision of the General Accounting Office, and that office will in all probability make the first review of any disputes clause decision. If that agency should decide that the decision was not supported by substantial evidence, it would appear that the contractor would have no redress. Furthermore, the General Accounting Office is a part of the legislative department of the Government. . . . If this agency is made another Court of Claims, in a sense it becomes a judge and jury and a prosecutor." *Id.*, at 97.

Mr. Dahling therefore supported GAO's bill because it did "not grant judicial power to the General Accounting Office." *Id.*, at 98. Charles Maechling, Jr., a representative of the Radio-Electronics-Television Manufacturers Association, echoed this view.

"Under S. 24, however, the scope and powers of the General Accounting Office are vastly enlarged, and this agency of the Government, which has heretofore exercised principally investigatory and audit functions, becomes clothed with powers of a judicial nature. S. 24 appears to set up the General Accounting Office as a third administrative tier of review in Government contract disputes." *Id.*, at 105.

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Similarly, the American Merchant Marine Institute submitted a statement objecting to H. R. 1839

"in so far as it establishes the General Accounting Office as a sort of intermediate or 'floating' court and vests it with express statutory authority to set aside [an administrative] decision merely because its administrative officers in their opinion consider the decision not to be supported by substantial evidence. On the other hand, we fully agree that a decision of a contracting officer or, upon appeal, of the head of the contracting agency, should be subject to judicial review and reversal by the courts This judicial function, however, should not be shared with or otherwise vested in the General Accounting Office The literal effect of S. 24 appears to be that once the General Accounting Office may have found the decision to be not supported by substantial evidence, it may not thereafter be pleaded in court either by the contracting party or the Government as limiting the scope of judicial review to that provided for by the disputes clause." *Id.*, at 122.

Opposition to H. R. 1839, then, was premised on the fear that its reference to GAO might deprive contractors of any recourse to the courts. That judicial review was the contractors' sole concern is also clear from the position taken by the Associated General Contractors, *id.*, at 61-75, which supported H. R. 1839 on the ground that it would restore to contractors "the fundamental right of judicial review of disputes arising under Government contracts." *Id.*, at 62.

That deletion of the reference to GAO was not understood as denying judicial review to the Government becomes evident from an examination of Representative Willis' testimony about his bill, H. R. 6946, which was identical to H. R. 1839 except that it omitted the words "the General Accounting Office or." *Id.*, at 31. He tes-

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tified that the "Wunderlich decision could react, and has reacted unfavorably to the Government where the Government felt it was the aggrieved party." *Id.*, at 32. The following colloquy then occurred:

"Mr. HYDE. The only question that occurred to me was that you mentioned there might be a time when the Government was the aggrieved party. With the present procedure, the Government is not likely to be the aggrieved party?

"Mr. WILLIS. It could be. It could very well be, because here you are dealing with fraud, and the court says that in order to have relief one must be guilty of fraud. Now, a contracting officer who hands down a decision against the Government can very adversely affect the Government itself, and the Government some of these days might find a decision very much against itself. The decision works both ways, in that there is no appeal either way from the holding of the contracting officer unless a showing of fraud is made, and the Government itself might be caught some of these days under this Wunderlich decision. I know of one case when the court so ruled.

"Mr. HYDE. If the contracting officer makes a finding, under what circumstances would the Government be the one to take an appeal or want to take an appeal? Who would be the one in the Government to say, 'We are going to take an appeal'?

"Mr. WILLIS. I imagine the General Accounting Office would be interested, and the Department of Justice and the Department of Defense. Suppose a dispute arises . . . [a]nd then on matters of fact the contracting officer holds one way. Then neither side has recourse unless there is a showing that the

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contracting officer was dishonest, was guilty of fraud, or intended to cheat someone." *Id.*, at 33-34.

This testimony is significant also in light of the later testimony of Franklin M. Schultz, a former law professor who had written about the problems created by the *Wunderlich* decision. Mr. Schultz expressed concern that GAO's substitute bill did "not say specifically that an appeal can be taken by an aggrieved contractor." A committee member then asked whether the language of GAO's bill did "not necessarily include both parties." *Id.*, at 110. The following colloquy ensued:

"Mr. SCHULTZ. Yes, and that is exactly my point. . . . [S]everal years from now, if the Comptroller General decides . . . that a contracting officer's decision is not supported by substantial evidence, he could refuse payment, and in a court action he could say that this bill means that it is a two-way street, not only may the contractor upset the contracting officer for not having substantial evidence behind the decision, but in the case where the contracting officer makes a decision favorable to the contractor the GAO has similar upsetting power. . . .

"Mr. WILLIS. This judicial review referred to in that passage there referring to a review by GAO, when GAO has been left out deliberately as compared to S. 24?

"Mr. SCHULTZ. Well, that is persuasive, sir, but you do have the testimony of Mr. Fisher, sponsoring [GAO's] bill . . . saying that the rights of contractors and the Government to appeal should be coextensive. . . ." *Id.*, at 110-111.

Mr. Schultz went on to say, what was implicit in the above colloquy, that his objection was not to judicial

review for the Government, which he recognized would be available, but to judicial review for either the Government or contractors on the basis of the "substantial evidence" test. He indicated that his "own preference would be for the language of [GAO's] bill without the phrase 'substantial evidence,' " *id.*, at 113, and in a subsequent letter to the Subcommittee he again suggested that neither the Government nor contractors should be permitted to rely upon that standard to upset an administrative decision, *id.*, at 118-119.

The Subcommittee was presented with, but took no action upon, a bill proposed by the American Bar Association that would have expressly limited the right of judicial review to contractors. *Id.*, at 89. Instead, the Committee reported out the bill that is now the Wunderlich Act. H. R. Rep. No. 1380, 83d Cong., 2d Sess. (1954). The report stated:

"The purpose of the proposed legislation . . . is to overcome the effect of the Supreme Court decision . . . under which the decisions of Government officers rendered pursuant to the standard disputes clauses in Government contracts are held to be final absent fraud on the part of such Government officers.

" . . . The proposed legislation also prescribes fair and uniform standards for the judicial review of such administrative decisions in the light of the reasonable requirements of the various Government departments and agencies, of the General Accounting Office and of Government contractors." *Id.*, at 1-2.

The report also discussed the effect of the legislation on GAO, in much the same terms as had the prior Senate reports.

"The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present

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jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.

"The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office. It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill. At the same time there is no intention of setting up the General Accounting Office as a 'court of claims.' Nor should the elimination of the specific mention of the General Accounting Office in the bill be construed as limiting its review to the fraudulent intent standard prescribed by the Wunderlich decision." *Id.*, at 6-7.

Representative Graham stated on the floor of the House that the Comptroller General had approved the bill, and the House passed it without debate.- 100 Cong. Rec. 5510. When the bill came to the Senate, Senator McCarran explained that

"The purpose of the proposed legislation is to overcome the inequitable effect, under the decision of the Supreme Court in the Wunderlich case, of language in Government contracts which makes the decision of the contracting officer or the head of the agency final, with respect to questions of fact. To put it another way, the objective of this bill is to preserve the right of review by the courts in cases

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involving action by a contracting officer which is arbitrary, capricious, fraudulent, or so grossly erroneous as necessarily to imply bad faith.

"The language of the House bill, while quite different from the language approved in the Senate, is designed to accomplish the same purpose. It is my understanding the Department of Justice takes the view that the House language will accomplish the same purpose as the Senate language. It is my further understanding that the Comptroller General of the United States has expressed complete satisfaction with the House language, and has declared that in his opinion it will accomplish the purposes sought to be served by the Senate language." *Id.*, at 5717.

After Senator McCarran further assured the Senate that GAO was "satisfied with the language in the House bill" and that "otherwise [he] would not care to go along," *ibid.*, a final colloquy occurred:

"Mr. THYE. As I understand, the bill was passed by the Senate, and a similar bill was passed by the House. The only question involved is a modification of the language in the Senate bill, and the two bills agree in their effect, so to speak?

"Mr. McCARRAN. That is correct.

"Mr. THYE. There is nothing else of a legislative nature involved. Is that correct?

"Mr. McCARRAN. That is correct." *Id.*, at 5718.

The Senate then passed the bill. *Ibid.*